(8)

No. 95-1263-CFX Title: Caterpillar Inc., Petitioner
v.
James David Lewis

Docketed: February 8, 1996 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Feb 8 1996	Petition for writ of certiorari filed. (Response due March 9, 1996)
	Mar 6 1996	Brief of respondent James David Lewis in opposition filed.
	Mar 20 1996	DISTRIBUTED. April 12, 1996
	Apr 15 1996	Petition GRANTED. limited to Questions 1 and 2 presented by the petition. SET FOR ARGUMENT November 12, 1996. **********
	May 28 1996	Order extending time to file brief of petitioner on the merits until June 14, 1996.
	Jun 14 1996	Joint appendix filed.
	Jun 14 1996	Brief of petitioner Caterpillar, Inc. filed.
	Jun 14 1996	Motion of Product Liability Advisory Council, Inc. for leave to file a brief as amicus curiae filed.
	Jul 11 1996	Order extending time to file brief of respondent on the merits until July 31, 1996.
	Jul 31 1996	Brief of respondent James David Lewis filed.
	Aug 5 1996	LODGING consisting of one set of five briefs filed in the Court of Appeals submitted by counsel for the respondent
	Aug 14 1996	Record filed.
	Aug 26 1996	Record filed.
	Aug 29 1996	Reply brief of petitioner Caterpillar Inc. filed.
	Sep 5 1996	Motion of Product Liability Advisory Council, Inc. for leave to file a brief as amicus curiae GRANTED.
	Sep 9 1996	CIRCULATED.
	Nov 12 1996	ARGUED.

1 pp

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

CATERPILLAR INC. — PETITIONER

v.

JAMES DAVID LEWIS — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LESLIE W. MORRIS II
COUNSEL OF RECORD

ROBINSON MAREADY LAWING & COMERFORD, L.L.P.
WILLIAM F. MAREADY
380 KNOLLWOOD STREET
SUITE 300
WINSTON-SALEM, NC 27103
(901) 631-8500

STOLL, KEENON & PARK, LLP
LESLIE W. MORRIS II
LIZBETH ANN TULLY
201 E. MAIN STREET
SUITE 1000
LEXINGTON, KENTUCKY 40507
(606) 231-3000

ATTORNEYS FOR PETITIONER CATERPILLAR INC.

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Whether in a removed action the principles of judicial economy preclude vacating a judgment due to an alleged lack of diversity of citizenship at the time of the removal when the nondiverse party was dismissed from the action prior to trial and said party's rights were derivative of the plaintiff?

2. Whether in a removed action the failure to file an interlocutory appeal from the denial of a motion to remand constitutes a waiver of the jurisdictional challenge where the alleged jurisdictional defect existing at the time of removal was subsequently cured prior to trial?

3. Whether in a removed action the citizenship of a tortfeasor against whom a worker's compensation carrier asserted a claim derivative of the plaintiff's personal injury claim should be considered for purposes of determining diversity of citizenship where the plaintiff settled the personal injury claim against the tortfeasor prior to removal?

LIST OF PARTIES

The Petitioner is Caterpillar Inc., a corporation which has no parent companies. Its nonwholly owned subsidiaries include Cyclean, Inc.; Advanced Filtration Systems, Inc.; Health Plan of Central Illinois, Inc.; Caterpillar Commercial N.V.; AO Nevarnash; and UNOC Equipment and Supply, LLC. The Respondent is James David Lewis. The parties to the proceedings before the Sixth Circuit Court of Appeals were limited to Caterpillar Inc. and James David Lewis. The proceedings before the United States District Court for the Eastern District of Kentucky, Ashland Division, also included Liberty Mutual Insurance Group; Gene A. Wilson Enterprises, Inc.; and Whayne Supply Company.

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STATUTES

Petitioner, Caterpillar Inc., petitions as follows for a Writ of Certiorari to review the October 11, 1995 Opinion of the United States Court of Appeals for the Sixth Circuit which vacated the Judgment entered by the United States District Court for the Eastern District of Kentucky, Ashland Division, on November 23, 1993.

OPINIONS BELOW

The Judgment of the United States District Court for the Eastern District of Kentucky, Ashland Division, entered on November 23, 1993, and the Opinion of the United States Court of Appeals for the Sixth Circuit entered on October 11, 1995 are not published.

JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Sixth Circuit on October 11, 1995. A Petition for a Rehearing filed by Petitioner, Caterpillar Inc., was denied by the United States Court of Appeals for the Sixth Circuit on November 21, 1995.

Caterpillar Inc. seeks to invoke the jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. §1254(1) (1993) which provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the

following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATUTES

One federal statute involved in this review is 28 U.S.C. §1332(a)(1) (1993) which provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

A second federal statute involved in this review is 28 U.S.C. §1446(b) (1995) which provides:

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

A third federal statute included in this review is 28 U.S.C. §1292(b) (1995) which provides:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the

Court of Appeals or a judge thereof shall so order.

The state statute involved in this review is Ky. Rev. Stat. §342.700(1) (1995) which provides:

> (1) Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, but he shall not collect from both. If the injured employee elects to proceed at law by civil action against the other person to recover damages, he shall give due and timely notice to the employer and the special fund of the filing of the action. If compensation is awarded under this chapter, the employer, his insurance carrier, the special fund, and the uninsured employer's fund, or any of them, having paid the compensation or having become liable therefor, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expense. The notice of civil action

shall conform in all respects to the requirements of KRS 411.188(2).

STATEMENT OF THE CASE

This Petition for Writ of Certiorari ("Petition") arises out of a personal injury action brought on June 22, 1989, in Lawrence Circuit Court, Lawrence County, Kentucky, by James David Lewis ("Lewis") [with Kentucky citizenship] against Caterpillar Inc. ("Caterpillar") [with Delaware and Illinois citizenship] and Whayne Supply Company ("Whayne Supply") [with Kentucky citizenship]. Liberty Mutual Insurance Group ("Liberty Mutual") [with Massachusetts citizenship] filed an intervening complaint seeking pursuant to Ky. Rev. Stat. §342.700(1) (1993) to recover against Caterpillar and Whayne Supply past and future worker's compensation payments paid to Lewis. After discovering that Lewis subsequently settled his claims against Whayne Supply, the sole party which had previously precluded a removal based on diversity of citizenship, Caterpillar on June 21, 1990 pursuant to 28 U.S.C. §1446(b) (1995) removed the action to the United States District Court for the Eastern District of Kentucky, Ashland Division ("District Court") with jurisdiction being premised on 28 U.S.C. §1332(a)(1) (1993).

Lewis sought a remand arguing that the parties still lacked complete diversity. Notwithstanding the fact that Lewis settled his claims against Whayne Supply, the nondiverse party, Lewis maintained that Whayne Supply remained a party to the action because the scope of his settlement with Whayne Supply did not include Liberty Mutual's subrogation claim against Whayne Supply. Caterpillar took the position that the settlement automatically invoked Liberty Mutual's right of

subrogation against Whayne Supply and thereby by law the settlement included the claim of the worker's compensation carrier against Whayne Supply.

On September 24, 1990, the District Court entered an Order denying a remand to state court. Subsequently, Liberty Mutual settled its dispute with Whayne Supply over the attempt to exclude Liberty Mutual from Lewis' settlement, and on June 8, 1993, the District Court entered an Agreed Order formally dismissing Whayne Supply from the action.

The matter was tried before a jury beginning on November 15, 1993 and ending on November 22, 1993, when a unanimous jury entered a verdict for Caterpillar. The District Court on November 23, 1993 entered a Judgment for Caterpillar.

Lewis appealed to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"), which by Opinion dated October 11, 1995 vacated the Judgment of the District Court, finding a lack of subject matter jurisdiction and noting that the District Court should have remanded the action to the state court in 1990 because complete diversity of citizenship did not exist at the time:

> When an action is removed based on diversity, we must determine whether complete diversity exists at the time of removal. *Higgins v. E.I. DuPont De Nemours & Co.*, 863 F.2d 1164, 1166 (4th Cir. 1988).

(Appendix A, p. 6a).

> [A]t the time Caterpillar removed the case to federal court, plaintiff, a resident of Kentucky, remained a party to the case by virtue of his claim against defendant, Caterpillar. Defendant Whayne Supply Co., a Kentucky corporation, was also a party to the case in light of intervening plaintiff Liberty Mutual's subrogation claim against it. Thus, complete diversity did not exist at the time the case was removed to federal court. Unfortunately, we must remand a case that has proceeded through judgment in the district court.

(Appendix A, p. 8a).

The Sixth Circuit failed to consider (1) the subsequent curing of the alleged jurisdictional defect prior to trial, (2) the failure of Lewis to seek review of the denial of his motion for a remand prior to the curing of the alleged jurisdictional defect, and (3) the derivative nature of the subrogation claim asserted by Liberty Mutual against Whayne Supply, *i.e.*, Liberty Mutual was entitled to its statutory share upon Whayne Supply's settlement with Lewis and thereupon ceased to have a viable claim against Whayne Supply. Caterpillar Inc. filed a Petition for Rehearing raising these omissions. The Petition for Rehearing was denied by the Sixth Circuit on November 21, 1995.

ARGUMENT

Underlying the questions presented for review on page i and the argument set forth below is the fact that the Sixth Circuit vacated a judgment entered on a unanimous jury verdict rendered after a six-day trial, in a case that had been practiced in the District Court for five years, on the ground that complete diversity did not exist when the case was removed from the state court – when in fact such diversity did exist at the time of removal and such diversity did exist at the time of trial. Five years of judicial time and resources will have been wasted if this finding is allowed to stand.

I. THERE IS AN INCONSISTENCY AMONGST THE CIRCUITS AS TO WHETHER THE PRINCIPLES OF JUDICIAL ECONOMY ARE VIOLATED BY VACATING A JUDGMENT BASED UPON A FINDING OF LACK OF DIVERSITY WHEN AT THE TIME OF THE TRIAL THE NONDIVERSE PARTY HAD BEEN DISMISSED.

This Petition raises the crucial issue of whether the principles of judicial economy must be sacrificed for the sake of a strict adherence to the general rule that 28 U.S.C. §1332(a) (1) (1993) and 28 U.S.C. §1446(b) (1995) require that in a removed action the jurisdiction of the federal court is determined at the time of removal. *E.g., Jackson v. Allen*, 132 U.S. 27, 33 L.Ed. 249, 10 S.Ct. 9 (1889); *Roecker v. United States*, 379 F.2d 400, 407 (5th Cir. 1967), *cert. denied*, 389 U.S. 1005 (1967). Although this Court and other federal courts have recognized a judicial economy exception to this rule, the boundaries of that exception are unclear. This uncertainty permitted the

Sixth Circuit, relying on an alleged jurisdictional defect at the time of removal, to toss aside as superfluous a unanimous jury verdict entered after a six day trial, despite the fact that all agree that the alleged jurisdictional defect had been cured prior to trial. Such a grave waste of judicial resources, combined with the inconsistent treatment of cured jurisdictional defects amongst the Circuits supports the granting of this Petition.

The circumstances surrounding the alleged jurisdictional defect which prompted the Sixth Circuit to vacate the Judgment and thereby render five years of federal litigation void are simple. When the action was originally brought by Lewis in the Lawrence Circuit Court, the parties were lacking in complete diversity. Plaintiff Lewis was a citizen of Kentucky. Defendant Caterpillar was a citizen of Delaware and Illinois and Defendant Whayne Supply was a citizen of Kentucky. Lewis thereafter entered into a settlement with Whayne Supply, thus eliminating the only nondiverse defendant and allowing Caterpillar on June 21, 1990 to remove the action to the District Court pursuant to 28 U.S.C. §1446(b) (1995).

The removal, however, was objected to by Lewis on the grounds that the scope of his settlement with Whayne Supply was insufficient to include the claims of Liberty Mutual asserted in an intervening complaint against Whayne Supply and Caterpillar. As will be more fully set forth herein (see Argument III *infra*), it was inappropriate for the Sixth Circuit to consider the claims asserted in the intervening complaint for the purposes of determining whether diversity jurisdiction existed. Nonetheless, assuming *arguendo* that Liberty Mutual's intervening complaint against Whayne Supply precluded

the removal, the subsequent dismissal of the claims asserted against Whayne Supply therein cured this alleged jurisdictional defect.

Quite simply, the nondiverse party (whose interests were derivative of the plaintiff's claim) was dismissed from the action prior to trial. The District Court entered an Agreed Order on June 8, 1993 formally dismissing the intervening complaint against Whayne Supply. The matter was subsequently tried beginning on November 15, 1993 and extending to November 22, 1993 without the presence of Whayne Supply, the nondiverse party upon whom the Sixth Circuit relied to vacate the unanimous Jury Verdict and Judgment entered by the District Court on November 23, 1993.

The most basic principles of judicial economy will not permit such a waste of judicial resources. This Court initially defined the requirements of judicial economy in the context of a case where the party opposing removal failed to raise the jurisdictional challenge prior to trial. In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 31 L.Ed.2d 612, 92 S.Ct. 1344, 1347 (1972), this Court indicated that under such circumstances the subsequent curing of the jurisdictional defect was sufficient to avoid a post-trial remand to the state court:

> Longstanding decisions of this Court make clear, however, that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had

> original jurisdiction of the case had it been filed in that court.

Grubbs v. General Electric Credit Corp., 92 S.Ct. at 1347. *Grubbs* reaffirmed a prior acknowledgement by this Court that jurisdictional defects could be cured prior to trial:

> There are cases which uphold judgments in the district courts even though there was no right to removal. In those cases, the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case.

American Fire & Casualty Co. v. Finn, 341 U.S. 6, 95 L.Ed. 782, 71 S.Ct. 534, 541, (1951) (footnote omitted).

Grubbs, *Finn*, and their progeny reveal a policy, grounded in the principles of judicial economy, that a post-trial remand to the state court is not required if the federal court has subject matter jurisdiction at the time of the trial and judgment, notwithstanding deficiencies alleged to have existed at the time of removal. *E.g.*, *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988).

> To permit a case in which there is complete diversity throughout trial to proceed to

> judgment and then cancel the effect of that judgment and relegate the parties to a new trial in a state court because of a brief lack of complete diversity at the beginning of the case would be a waste of judicial resources.

Knop v. McMahan, 872 F.2d 1132, 1139 n.15 (3rd Cir. 1989).

> An impartial reading of precedent indicates . . . that although equity is not a substitute for subject matter jurisdiction, where complete diversity exists at the time of judgment or trial, it would be a waste of judicial resources to dismiss a case in its entirety because it lacked diversity from the moment of its inception.

Iscar Ltd. v. Katz, 743 F. Supp. 339, 344 (D. N.J. 1990). *See also, Davis v. Customized Transp., Inc.*, 854 F. Supp. 513, 517 (N.D. Ohio, 1994) ("Because there is complete diversity and the proper amount in controversy, this court has subject matter jurisdiction and can enter judgment regardless of the fact that the case was improperly removed.").

The Sixth Circuit has in the past recognized the wisdom of this policy noting: "The *Grubbs* rule is eminently sensible and conservative of judicial economy. It was the approach adopted long ago in this Circuit, . . ." *Chivas Products Ltd. v. Owen*, 864 F.2d 1280, 1286 (6th Cir. 1988). Thus, in *Riggs v. Island Creek Coal Co.*, 542 F.2d 339, 343 (6th Cir. 1976), the Sixth Circuit upheld the jurisdiction of the District Court, following an improper removal, based on a finding that it would be "absurd" to

rely on a prior jurisdictional defect to vacate a judgment rendered under complete diversity.

Notwithstanding these authorities, the Sixth Circuit vacated the Judgment granted by the District Court to this Petitioner due to an alleged jurisdictional defect cured prior to the trial and entry of Judgment. The Sixth Circuit did not indicate why it refused to follow *Grubbs, Finn* and their progeny. It may be speculated that since Lewis argued before the Sixth Circuit that the principles of judicial economy were limited to circumstances in which the party opposing the removal failed to seek a remand, the Sixth Circuit thought the precedent to be distinguished on this ground. The Sixth Circuit may have thought that the fact that Lewis filed a motion to remand, which was denied by the District Court, precluded the application of the principles of judicial economy. Yet, such a strict reading of *Grubbs* and *Finn* is inappropriate. *See, Able v. Upjohn Co.*, 829 F.2d 1330 (4th Cir. 1987), *cert. denied*, 485 U.S. 963 (1988) and *Gould v. Mut. Life Ins. Co. of New York*, 790 F.2d 769 (9th Cir. 1986), *cert. denied*, 479 U.S. 987 (1986).

In both *Able* and *Gould* the district court denied a motion to remand; notwithstanding the fact that the jurisdictional defect was timely raised, the appellate court refused to vacate the subsequent judgment which was entered under complete diversity. The reasoning of the appellate courts in both cases was identical to the reasoning applied in *Grubbs* where the jurisdictional defect went unchallenged. In *Able v. Upjohn Co.*, 829 F.2d at 1334 the Fourth Circuit held:

> Here, judicial economy and finality require that the district court's judgment be allowed to stand. Where a matter has

> proceeded to judgment on the merits and principles of federal jurisdiction and fairness to parties remain uncompromised, to disturb the judgment on the basis of a defect in the initial removal would be a waste of judicial resources. *See Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612, (1972).

The same result was reached by the Ninth Circuit in *Gould v. Mut. Life Ins. Co. of New York*, 790 F.2d at 774: "[u]nder the Grubbs/American Fire rule, the court below had subject matter jurisdiction." Thus the Fourth and Ninth Circuits have recognized that *Grubbs*, *Finn*, and their progeny are not limited in application to cases in which the party opposing removal failed to timely raise the jurisdictional challenge.

The Sixth Circuit erred in failing to recognize as well the extended application of the principles of judicial economy outside the context of a waiver. That error will no doubt be repeated if the controversy is not resolved by this Court. Caterpillar requests that its Petition be granted to enable this Court to insure a uniform application of the principles of judicial economy to removed actions.

II. THE CIRCUITS ARE ADDITIONALLY INCONSISTENT AS TO WHETHER A JURISDICTIONAL CHALLENGE TO A REMOVED ACTION MUST BE RAISED IN AN INTERLOCUTORY APPEAL OR THEREAFTER BE WAIVED IF THE JURISDICTIONAL DEFECT IS CURED.

This Petition raises a related inconsistency amongst the Circuit Courts of Appeals. The Fourth and Ninth Circuits have recognized that the drastic consequences of a post-trial review of a jurisdictional defect can be avoided by requiring the party seeking a remand to file an interlocutory appeal from the denial of the motion to remand. In contrast, the First, Fifth, and D.C. Circuits have rejected such a requirement. The granting of this Petition will enable this Court to resolve this significant controversy.

The facts set forth in this Petition illustrate the severity of the resolution adopted by the Sixth Circuit. The alleged jurisdictional defect relied upon by the Sixth Circuit to vacate the Judgment in 1995 was readily identified by Lewis in 1990 when the action was first removed. The District Court on September 24, 1990 entered an Order denying the remand sought by Lewis. Rather than file an interlocutory appeal as authorized by 28 U.S.C. §1292(b) (1995) and raising the alleged jurisdictional defect at the outset, Lewis permitted the action to continue in the federal system for five years, culminating in an appellate decision which vacated the Judgment entered by the District Court and thereby rendered the efforts of the parties, the court, and jury a complete nullity. Such a strategy should not have been condoned by the Sixth Circuit. The interests of finality and judicial economy "strongly suggest that the district

court's judgment should not be disturbed where a party fails to avail himself of a remedy that might earlier have resolved the removal question." *Able v. Upjohn Co.*, 829 F.2d at 1333.

The teaching of this Court as reflected in *Grubbs* and *Finn* have been relied upon by several Circuits to hold that a party who fails to pursue an interlocutory appeal pursuant to 28 U.S.C. §1292(b) (1995) is precluded at a later date from relying on a jurisdictional defect to avoid jurisdiction where such defect has been cured prior to judgment. *E.g., Sheeran v. General Elect. Co.*, 593 F.2d 93, 97 (9th Cir. 1979), *cert. denied*, 444 U.S. 868 (1979).

> When a party elects to forego an interlocutory appeal, he runs the risk that the federal court will enter judgment on the basis of complete diversity. (citation omitted). This rule forces parties to give careful consideration to the importance of their objection to removal, but brings the benefit of early determination of the proper forum.

Able v. Upjohn Co., 829 F.2d at 1334.

> If the district court "would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of judgment," then the estoppel that applies to prevent a party from raising the removal errors does not "endow [the court] with a jurisdiction it could not possess." (citation omitted).

Gould v. Mut. Life Ins. Co. of New York, 790 F.2d at 773 (quoting *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 95 L.Ed. 782, 71 S.Ct. 534, 541 (1951)).

There is, however, an acknowledged conflict amongst the Circuits as to whether the jurisdictional defect must be raised before the appellate court at the first available opportunity. *See Sheeran v. General Elect. Co.*, 593 F.2d at 97 describing the conflict. The First Circuit for example has held:

> Denial of remand is a non-appealable interlocutory order, and a plaintiff whose request has been rejected does not waive his objection by then proceeding with his case in the ordinary course.

Brough v. United Steelworkers of America, 437 F.2d 748, 749 (1st Cir. 1971). The Fifth and D.C. Circuits follow this reasoning as well. *See Neal v. Brown*, 980 F.2d 747 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 1945 (1993); *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 105 (5th Cir. 1990), *cert. denied*, 498 U.S. 817 (1990).

The facts set forth in this Petition exemplify the harsh consequences of the reasoning adopted by the First, Fifth and D.C. Circuits. The difficult deliberations of a unanimous jury which labored through a six day trial and the five years to which the federal judiciary devoted its resources to this litigation have been discarded as if of no consequence. This wasted effort could have been avoided if Lewis had filed an interlocutory appeal in 1990 when the District Court denied his motion to remand.

This Court may prevent further needless drain on the federal judicial resources by granting this Petition and

by resolving the controversy amongst the Circuits as to whether an interlocutory appeal is required in order to preserve a challenge to the jurisdiction of the federal court where the jurisdictional defect is cured prior to trial.

III. THERE IS AN UNCERTAINTY IN THE FEDERAL COURTS AS TO HOW DERIVATIVE CLAIMS SHOULD BE CONSIDERED FOR THE PURPOSES OF DETERMINING DIVERSITY OF CITIZENSHIP.

"The law of removal jurisdiction currently stands in an indefinite condition marked by uncertainty and inconsistency." *Hopkins Erecting Co. v. Briarwood Apartments of Lexington*, 517 F. Supp. 243, 247 (E.D. Ky. 1981). This absence of precedent led the Sixth Circuit to vacate the Judgment by erroneously relying upon a derivative claim against a nondiverse defendant with whom the plaintiff had settled. The granting of the Petition will permit this Court to fill this significant gap and to explain the role that derivative claims should play in the diversity analysis in removal actions.

Although there are a variety of circumstances under which derivative claims can be asserted, the claims herein arose in the context of a subrogation claim asserted by Liberty Mutual. The Sixth Circuit evidently did not recognize the true nature of this claim. Such subrogation claims are frequently asserted in personal injury actions by worker's compensation carriers who have paid benefits to the injured employee who is bringing suit against the tortfeasors alleged to have caused the injuries. It is common in the trial of such cases for the intervening carrier not to be mentioned and

not to participate. If a plaintiff employee receives a verdict, the trial judge then determines the amount of the judgment the carrier is entitled to recover. After Lewis brought suit against Whayne Supply and Caterpillar, Liberty Mutual filed an intervening complaint against both Whayne Supply and Caterpillar seeking reimbursement for worker's compensation benefits paid and to be paid to Lewis as a result of the injuries alleged in the complaint.

Lewis then settled his claims against Whayne Supply, the only nondiverse defendant. A voluntary dismissal or discontinuation of an action against the defendant whose presence in the case prevents remand makes the case removable. *Bumgardner v. Combination Engineering, Inc.*, 432 F. Supp. 1289, 1291 (D. S.C. 1977).

> A settlement between a plaintiff and the non-diverse defendant is final enough to support removal, even if the non-diverse defendant has not been severed from the case. (citation omitted).

Ratcliff v. Fibreboard Corp., 819 F. Supp. 584, 587 (W.D. Tex. 1992). Thus, the settlement between Lewis and Whayne Supply enabled Caterpillar to remove the action to federal court under 28 U.S.C. §1446 (1995).

This result is not altered by the fact that the Liberty Mutual claim against Whayne Supply remained of record. The court is not so bound by the technical form of the pleadings. *See Florida First Nat'l Bank of Jacksonville v. Bagley*, 508 F. Supp. 8, 9 (M.D. Fla. 1980). The Sixth Circuit should have gone beyond the pleadings to determine the viability of Liberty Mutual's claim against Whayne Supply.

Liberty Mutual's statutory subrogation claim was inextricably tied to Lewis' claim against Whayne Supply. It was premised on Ky. Rev. Stat. §342.700(1) (1993) which provides that the insurer "may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists." "[I]t is settled that an insurer's statutory subrogation right under KRS 342.700(1) is a derivative rather than an independent right." *United States Fidelity & Guar. Co. v. Fox*, 872 S.W.2d 91, 94 (Ky. Ct. App. 1993), citing *National Biscuit Co. v. Employers Mut. Liability Ins. Co.*, 313 Ky. 305, 231 S.W.2d 52, 54 (1950).

> [The Worker's Compensation Act] does not create a new cause of action in favor of the employer or his insurance carrier, but merely authorizes the employer or his insurance carrier in his or its own name or in the name of the injured employee to institute and prosecute the injured employee's cause of action. (citation omitted).

National Biscuit Co. v. Employers Mut. Liability Ins. Co., 231 S.W.2d at 53.

> [T]he rights to reimbursement and subrogation provided by statute are tied directly to the employee's recovery of damages from a third party. It is not in addition to the jury's award.

Ingersoll-Rand Co. v. Rice, 775 S.W.2d 924, 931 (Ky. Ct. App. 1989).

> The compensation insurance carrier should intervene to notify the court of its claim for reimbursement from the plaintiff's recovery. Having notified the court by intervening complaint of such right to reimbursement [the insurance carrier] should have been entitled to reimbursement . . . .

Zurich American Ins. Co. v. Haile, 882 S.W.2d 681, 686 (Ky. 1994).

To the extent that the employee recovers against a tortfeasor damages for loss of earnings "the compensation carrier is subrogated and, . . . is entitled to be reimbursed before the claimant collects." *Hillman v. American Mut. Liability Ins. Co.*, 631 S.W.2d 848, 850 (Ky. 1982). Where the plaintiff employee has filed an action against a third party, it is the purpose of the statute "to reimburse the employer or his insurance carrier out of any recovery against the third party tort feasor". *National Biscuit Co. v. Employers Mut. Liability Ins. Co.*, 231 S.W.2d at 54. Liberty Mutual's "rights derive from the employee's right to payment and are a corollary to the employee's right to payment." *Mastin v. Liberal Markets*, 674 S.W.2d 7, 11 (Ky. 1984). Accordingly, once Lewis settled with Whayne Supply, Liberty Mutual was "entitled to immediate statutory subrogation as to such amount of [the] settlement as duplicate worker's compensation benefits." *Mastin v. Liberal Markets*, 674 S.W.2d at 14. *See also Roberts v. United States Fidelity & Guaranty Co.*, 273 S.W.2d 39, 41 (Ky. 1954) ("Any recovery of [plaintiff against defendant], to the extent he has received compensation payments from the insurance carrier, is automatically assigned to the latter by operation of law.").

The settlement triggered Liberty Mutual's subrogation rights.

Under Kentucky law, Liberty Mutual's derivative claims against Whayne Supply therefore did not survive the settlement between Lewis and Whayne Supply. Thus, at the time of removal, the only true parties to this action were Lewis, Caterpillar, and Liberty Mutual asserting a derivative claim against Caterpillar. Since Lewis, Caterpillar and Liberty Mutual were all diverse parties, there was no jurisdictional defect to preclude the District Court from exercising diversity jurisdiction over the action at the time of removal. The Sixth Circuit thereby erred in vacating the Judgment entered by the District Court based on the continued presence of Whayne Supply in the action.

Unfortunately, there was little precedent to guide the Sixth Circuit in its review of this removal issue. This Court has recognized in a different context that it is the duty of the lower federal courts to "'look beyond the pleadings and arrange the parties according to their sides in the dispute.'" (citations omitted). *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 86 L.Ed. 47, 62 S.Ct. 15, 17 (1941). This Court has further recognized that an unnecessary and dispensable party should not be considered in ascertaining whether diversity jurisdiction exists. *See Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182, 68 L.Ed. 628, 44 S.Ct. 266, 267 (1924).

Various lower courts have likewise found that substance should not be permitted to rule over form. *E.g., Lesher by Lesher v. Andreozzi*, 647 F. Supp. 920 (M.D. Pa. 1986) (fact that nondiverse party had not been formally dismissed from action did not preclude removal when plaintiff settled with such defendant). *See also Reed*

v. Safeway Store, Inc., 400 F. Supp. 702 (N.D. Okla. 1925) (court refused to consider claim against nondiverse defendant where there was no legal theory by which such defendant could be held liable for the plaintiff's injuries). In a variety of contexts the lower courts have indicated that the presence of a nominal party would not destroy diversity jurisdiction. *E.g., Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc.*, 521 F. Supp. 1046, 1047 (S.D. N.Y. 1981); *Iowa Pub. Serv. Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977). There is, however, a void with regard to how claims purely derivative of the plaintiff's claims should be treated after the plaintiff's claim is settled.

Given the frequency in which subrogation claims are asserted in personal injury actions, this controversy is likely to arise again, not only in the Sixth Circuit but other Circuits as well. Caterpillar accordingly requests the Court to grant its Petition and thereby clarify how such claims should be treated by all the Circuits when determining whether or not the parties are in complete diversity.

CONCLUSION

For these compelling reasons which indicate that there is much uncertainty in the federal courts concerning the removal issues raised herein, Caterpillar Inc. requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted on this 7th day of February, 1996.

Leslie W. Morris II

LESLIE W. MORRIS II

ROBINSON MAREADY & COMERFORD, L.L.P.
WILLIAM F. MAREADY
380 Knollwood Street
Suite 300
Winston-Salem, NC 27103
(901) 631-8500

STOLL, KEENON & PARK, LLP
LESLIE W. MORRIS II
LIZBETH ANN TULLY
201 E. Main Street
Suite 1000
Lexington, Kentucky 40507
(606) 231-3000

ATTORNEYS FOR PETITIONER CATERPILLAR INC.

APPENDIX

APPENDIX A

FILED
Oct. 11, 1995
Leonard Green, Clerk

Not For Publication

No. 94-5253

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES DAVID LEWIS, Plaintiff-Appellant,	)	
LIBERTY MUTUAL INSURANCE GROUP, Intervening Plaintiff,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY
CATERPILLAR, INC. Defendant and Third-Party Plaintiff-Appellee,	)	
GENE A. WILSON ENTERPRISES, INC., Third-Party Defendant,	)	
WHAYNE SUPPLY COMPANY, Defendant.	)	

BEFORE: WELLFORD, MILBURN, and SUHRHEINRICH, Circuit Judges.

PER CURIAM. Plaintiff James David Lewis appeals the jury verdict for defendant Caterpillar, Inc. in this diversity action for personal injury. On appeal, the issues are (1) whether the district court erred in denying plaintiff's motion to remand the case to state court, (2) whether the district court erred in limiting the scope of discovery of prior similar accidents, (3) whether this court should enter sanctions against defendant for defendant's alleged improper response to discovery requests, (4) whether the district court erred in excluding certain exhibits, (5) whether the district court erred in excluding certain witnesses from testifying at trial, and (6) whether the district court erred by failing to instruct the jury on defendant's alleged failure to warn. For the reasons that follow, we vacate and remand.

I.

A.

On July 9, 1988, plaintiff James David Lewis, a resident of Louisa, Kentucky, was injured while he was

operating a Caterpillar D8K bulldozer, which was manufactured by defendant Caterpillar, Inc., a Delaware corporation with its principal place of business in Illinois. While plaintiff was operating the bulldozer near Louisa, Kentucky, a hydraulic hose connected to the cylinder that raises and lowers the bulldozer blade ruptured causing hydraulic fluid to spray over the engine of the bulldozer and also on plaintiff. The fluid ignited, and plaintiff received burns over approximately 48% of his body.

The evidence at trial showed that the steel hydraulic hose ruptured because it was positioned against the hood of the bulldozer causing the two steel surfaces to grind against each other. Caterpillar presented evidence that its XT3 hydraulic hoses are made with four layers of steel wrappings that give them a hardness greater than that of ball-bearing steel. Caterpillar argued at trial that several conditions existing in the D8K at the time of the accident, but not existing at the time of the D8K's manufacture, caused the hydraulic hose to fail. Caterpillar presented evidence that at some point prior to the accident, the D8K had been hit with a force of 15,000 to 30,000 pounds. This force sheared off a bolt that stabilized the tube assembly to which the hydraulic hoses were connected and bent the tube assembly about 20 degrees.

In addition, Caterpillar presented evidence that the hoses in the D8K at the time of the accident were manufactured by someone other than Caterpillar and were an inch to an inch and a half too long. Because the

hoses were too long, they made a larger loop thereby coming closer to the hood of the D8K. Further, evidence showed that the hoses, which had different types of connections on each end, had been installed backwards also causing the hoses to be positioned closer to the hood. Although Caterpillar's maintenance manual includes a visual depiction of how the hose is to be installed, the parties disputed whether this adequately explained the proper installation of the hoses.

On the other hand, plaintiff argued at trial that, notwithstanding these conditions, the D8K had a design defect that caused the accident in this case. Plaintiff's expert, Wayne Coloney, testified that the accident could have been avoided if Caterpillar had used a deflecting shield that would have prevented hydraulic fluid from spraying on the operator of a D8K should a hydraulic hose rupture. Plaintiff also argued that Caterpillar was aware of the propensity for and the danger of hydraulic hoses rupturing and causing fires on the D8K.

B.

Plaintiff initiated this action on June 22, 1989 in the Lawrence [Kentucky] Circuit Court. In his complaint, plaintiff alleged strict liability in tort, negligence, and breach of warranty and named as defendants Caterpillar, Inc., the manufacturer of the bulldozer, and Whayne Supply Co., a Kentucky corporation with its principal place of business in Kentucky, which serviced the bulldozer prior to the incident at issue in this case. After plaintiff filed his complaint, Liberty Mutual Insurance

Company ("Liberty Mutual"), a Massachusetts corporation with its principal place of business in Massachusetts, intervened as a plaintiff in the case. Liberty Mutual brought claims against both Caterpillar and Whayne Supply Co. for subrogation of worker's compensation benefits paid to Lewis on behalf of his employer and third-party defendant, Gene A. Wilson. While the case was pending in the state court, plaintiff entered into a settlement agreement with Whayne Supply Co. However, because Liberty Mutual was not included in the settlement agreement, it continued to assert its claims against Whayne Supply Co. Liberty Mutual also filed a cross-claim against Lewis for reimbursement for any worker's compensation paid him by Whayne Supply Co. with regard to Liberty Mutual's subrogation interest.

After learning of the settlement between plaintiff and Whayne Supply Co., Caterpillar removed the case to federal court, over Lewis' objection, on June 21, 1990. Plaintiff and Whayne Supply Co., however, did not file anything notifying the Lawrence Circuit Court of the settlement until August 2, 1990. Lewis subsequently filed a motion to remand the case to state court on the ground that because defendant Whayne Supply Co., a Kentucky corporation, remained a defendant in the case by virtue of Liberty Mutual's subrogation claim, there was not complete diversity at the time of the removal from the state court. The district court denied this motion on September 24, 1990.

Whayne Supply Co. and Liberty Mutual

subsequently settled their claims on June 8, 1993. A jury trial commenced on November 15, 1993. The jury returned a verdict in favor of defendant Caterpillar, Inc. on November 22, 1993. Plaintiff then filed a motion for a new trial, but the district court denied this motion on February 1, 1994. This timely appeal followed.

II.
A.

Plaintiff argues that the district court erred in denying his motion to remand the case to state court. Specifically, plaintiff asserts that the district court lacked subject matter jurisdiction because complete diversity between the parties did not exist at the time of removal. Plaintiff bases this assertion on the fact that, at the time of removal, plaintiff, a Kentucky resident, continued to be a party to the case, and defendant Whayne Supply Co., a Kentucky corporation, remained a defendant in the case by virtue of intervening plaintiff Liberty Mutual's subrogation claim against it. Removal is a question of federal subject matter jurisdiction that we review de novo. *Certain Interested Underwriters at Lloyd's London, England v. Layne*, 26 F.3d 39, 41 (6th Cir. 1994); *Van Camp v. AT&T Information Sys.*, 963 F.2d 119, 121 (6th Cir.), *cert. denied*, 113 S. Ct. 365 (1992). When reviewing the denial of a motion to remand a case to state court, "we look to determine '"whether the case was properly removed to federal court in the first place."'" *Van Camp*, 963 F.2d at 121 (quoting *Fakouri v. Pizza Hut of America, Inc.*, 824 F.2d

470, 472 (6th Cir. 1987) (quoting *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir. 1985)). *When an action is removed based on diversity, we must determine whether complete diversity exists at the time of removal. Higgins v. E.I. DuPont De Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988). Under 28 U.S.C. § 1332(a)(2), subject matter jurisdiction based on diversity of citizenship vests federal district courts with jurisdiction in cases of sufficient value between "citizens of a State and citizens or subjects of a foreign state." *Id.* A natural person's citizenship is determined by his domicile, while a corporation has the citizenship of the state of its incorporation and its principal place of business. *Safeco Ins. Co. v. City of White House*, 36 F.3d 540, 544 (6th Cir. 1994). "Diversity jurisdiction attaches only when all parties on one side of the litigation are of a different citizenship from all parties on the other side of the litigation." *SHR Limited Partnership v. Braun*, 888 F.2d 455, 456 (6th Cir. 1989). Accord *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, (1806); *Safeco Ins. Co.*, 36 F.3d at 545; and *Certain Interested Underwriters*, 26 F.3d at 42. In this regard, "[a] plaintiff seeking to bring a case into federal court carries the burden of establishing diversity jurisdiction." *Certain Interested Underwriters*, 26 F.3d at 41.

Caterpillar asserts that diversity jurisdiction was created when plaintiff settled with Whayne Supply Co. Thus, "[t]he question is simply whether, at the time of removal, the plaintiffs effectively 'ha[d] taken the resident defendant out of the case, so as to leave a controversy wholly between the plaintiff[s] and the nonresident

defendant.'" *Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 692 (5th Cir. 1995) (quoting *American Car & Foundry Co. v. Kettelhake*, 236 U.S. 311, 316 (1915)). See *Mancari v. AC & S Co.*, 683 F. Supp. 91, 93 (D. Del. 1988) (applying the voluntary act of the plaintiff doctrine and holding that a case may become removable after being initiated in state court where non-diverse defendant was dismissed from case leaving a new state of complete diversity between the parties). In this case, as plaintiff notes, Liberty Mutual continued to assert its claim against defendant Whayne Supply Co. after plaintiff settled with Whayne Supply Co.[1] Thus, at the time Caterpillar removed the case to federal court, plaintiff, a resident of Kentucky, remained a party to the case by virtue of his claim against defendant Caterpillar. Defendant Whayne Supply Co., a Kentucky corporation, was also a party to the case in light of intervening plaintiff Liberty Mutual's subrogation claim against it.[2] Thus, complete diversity

---

[1] Plaintiff claims that his settlement with Whayne Supply Co. was only partial and that he reserved a claim against Whayne Supply Co. for reimbursement for worker's compensation paid to him by Liberty Mutual. Lewis asserts that Liberty Mutual's subrogation claim against defendant Whayne Supply Co. was filed on behalf of Liberty Mutual and himself. We need not resolve this issue in light of our conclusion that because plaintiff and defendant Whayne Supply Co. remained parties to the case at the time of removal, diversity was not complete.

[2] Although Caterpillar argues on appeal that parties named in an intervening complaint are not included in diversity

(continued...)

did not exist at the time that the case was removed to federal court. Unfortunately, we must remand a case that has proceeded through judgment in the district court. We hold that the district court erred in denying plaintiff's motion to remand this case to the state court for lack of subject matter jurisdiction because complete diversity did not exist at the time this case was removed from the state court.[3]

III.

For the reasons stated, the judgment of the district court is VACATED and this case is REMANDED to the district court.

---

[2](...continued)
determinations, Caterpillar cites no authority for this proposition. This argument is not persuasive. This court has held under other circumstances that an intervening party may destroy diversity jurisdiction. Cf. *Jenkins v. Reneau*, 697 F.2d 160, 162 (6th Cir. 1983) (holding that an intervening petition by a non-diverse indispensable party destroys diversity jurisdiction).

[3] Because we hold that the district court lacked jurisdiction over this case, we do not reach plaintiff's other arguments on appeal.

APPENDIX B

Eastern District of Kentucky
FILED
Nov. 22, 1993
At Ashland
Leslie G. Whitmer
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

CIVIL MINUTES – TRIAL

ASHLAND
Case No. 90-84 At Ashland, Kentucky

Date: November 22, 1993

Style: JAMES DAVID LEWIS, ET AL. vs.
CATERPILLAR, INC., ET AL.

DOCKET ENTRY The motion of the parties to withdraw all chart exhibits is GRANTED and all chart exhibits shall be returned to the submitting party.

PRESENT:
HON. HENRY R. WILHOIT, JR.,
JUDGE.

Christina M. Venoy, Deputy Clerk — Peggy W. Weber, Court Reporter.

ATTORNEYS PRESENT FOR PLAINTIFFS:
Leonard Stayton
Phillip Moloney for Int. Pltf.

ATTORNEYS PRESENT FOR DEFENDANTS:
William Maready
Leslie Morris
Phillip Moloney for 3rd Party Deft.

____ Case called and continued to _____ for trial.
___ COURT TRIAL ___x___ JURY TRIAL

The Jury impaneled and sworn is as follows:

(1) 376 Vanessa L. Lowe (3) 429 Joseph Southers
(2) 437 Beverly J. Litteral (4) 324 Larry E. Wright

(5) 361 Mary A. Springer (7) 357 David J. Gollihue
(6) 306 Pamela J. Reynolds

(2nd Alternate) _____

____ Introduction of evidence for __ plaintiff
___ defendant __ begun, ___ resumed, not/and concluded;
____ Rebuttal evidence; __Surrebuttal evidence
___ Continued to _____ further trial.
___x___ Jury retires to deliberate at ___11:35 a.m.___;
Jury returns at ___3:55 p.m.___.
_____ JUDGMENT BY COURT ___x___ JURY VERDICT.

SEE VERDICT OR ANSWERS TO INTERROGATORIES

___x___ Jury polled.
_____ Proposed Findings of Fact, Conclusions of Law & Judgment to be prepared by ___ plaintiffs; ____ defendant.
____ Submitted. ____ BRIEFS to be filed _____ Plaintiff
_____ Defendant _____ Reply
within _____ days following the filing of transcript by Official Court Reporter.

Copies:

Initials of Deputy Clerk ____

APPENDIX C

Eastern District of Kentucky
FILED
Nov. 23, 1993
At Ashland
LESLIE G. WHITMER
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

JAMES DAVID LEWIS,
Plaintiff,
and

LIBERTY MUTUAL INSURANCE GROUP,
Intervening Plaintiff,

v. JUDGMENT IN A CIVIL CASE

CATERPILLAR, INC.,
Defendant and Third Party Plaintiff,

vs. CASE NUMBER: ASHLAND 90-84

GENE WILSON ENTERPRISES,
Third Party Defendant.

x **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict by answers to

Special Interrogatories,

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the plaintiff and intervening plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Caterpillar, Inc., recover of the plaintiffs, its costs of this action.

November 23, 1993
Date

LESLIE G. WHITMER, Clerk
Clerk

Christina M. Venoy
(By) Deputy Clerk

APPENDIX D

FILED
Nov. 21, 1995
Leonard Green, Clerk

No. 94-5253

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES DAVID LEWIS, Plaintiff-Appellant,

LIBERTY MUTUAL INSURANCE GROUP, Intervening Plaintiff,

v.

CATERPILLAR, INC. Defendant and Third Party Plaintiff-Appellee,

GENE A. WILSON ENTERPRISES, INC., Third Party Defendant,

WHAYNE SUPPLY COMPANY, Defendant.

ORDER

BEFORE: WELLFORD, MILBURN, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk *pe*

No. 95-1263

In The

Supreme Court of the United States

October Term, 1995

CATERPILLAR, INC.,

Petitioner,

v.

JAMES DAVID LEWIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

LEONARD J. STAYTON
Attorney at Law
P.O. Box 1386
Inez, Kentucky 41224
(606) 298-5117

Attorney for Respondent, James David Lewis

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

17 pp

QUESTIONS PRESENTED

1. Whether the alleged inconsistency between the circuits concerning the existence of subject matter jurisdiction in cases removed from state court merits the grant of writ of certiorari by this court.

2. Whether this court should grant certiorari so as to rule upon the question of derivative claims which are based upon state law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

This case is before this court upon the petition for writ of certiorari by Caterpillar, Inc. on the question of whether the Sixth Circuit was correct in its finding that subject matter did not exist in the district court and remanding this case to the state court for further proceedings.

This claim originally arose when the Plaintiff, James David Lewis, a Kentucky resident, filed a complaint in the Lawrence Circuit Court on June 22, 1989 against the Defendant, Whayne Supply, a Kentucky Corporation, and Caterpillar, Inc., a non-resident corporation. (Notice of Defendant, Caterpillar, Inc., of removal, 6/21/90, NR, 1). Subsequent to the filing of the complaint, Liberty Mutual Insurance Company intervened pursuant to Kentucky Revised Statute 342.700 in the name of James David Lewis and in its own name so as to protect its subrogation interest for workers' compensation benefits which had been paid to the Plaintiff, James David Lewis, on behalf of the Plaintiff's employer and Third-Party Defendant, Gene A. Wilson. (Notice of Defendant, Caterpillar, Inc., of removal, 6/21/90, NR. 1).

While this matter was still pending in the state court, the Plaintiff, James David Lewis, and the Defendant, Whayne Supply Company, entered into a partial settlement whereby the Plaintiff settled a portion of his claims against Whayne Supply Company, with the exception of any claims which the Plaintiff might have against the Defendant, Whayne Supply Company, for the amounts paid to the Plaintiff by the insurance carrier, Liberty Mutual Insurance Company, for workers' compensation

benefits. No papers were filed in the Lawrence Circuit Court concerning the settlement of this action until August 2, 1990. (Memorandum Opinion and Order, 9/24/90, NR 13, p. 3).

The Defendant, Caterpillar, Inc., then filed a Notice of Removal of this action to the United States District Court for the Eastern District of Kentucky, Ashland, Kentucky. (Notice of Defendant, Caterpillar, Inc., of removal, 6/21/90, NR 1). A timely objection was filed by the Plaintiff to the Notice of Removal and the Plaintiff subsequently filed a timely Motion to Remand. (Objection of Plaintiff to Notice of Removal, 6/29/90, NR. 3; Motion of Plaintiff to Remand to Lawrence Circuit Court, 8/2/90, NR. 6).

After judgment was entered in the District Court in favor of the Defendant, Caterpillar, Inc., the Plaintiff, James David Lewis, appealed this action to the U.S. Court of Appeals for the Sixth Circuit. On October 11, 1995 the Court of Appeals for the Sixth Circuit entered its opinion finding that as Whayne Supply Company, a Kentucky corporation, and James David Lewis, a Kentucky resident, remained as opposing parties, there was not complete diversity of citizenship and therefore subject matter jurisdiction did not exist. Therefore, the Sixth Circuit held that the district court erred in denying the Plaintiff's motion to remand this case to the state court for lack of subject matter jurisdiction because complete diversity did not exist at the time this case was removed from state court.

SUMMARY OF THE ARGUMENT

The initial question raised in the Petitioner's Petition for Writ of Certiorari is when subject matter jurisdiction is determined in the federal courts and whether subject matter jurisdiction is waived where a party, although filing a timely motion to remand and objection to removal, does not file a request for an interlocutory appeal. The question as set out by this court in *Grubbs v. General Electric Corporation*, 405 U.S. 697, 92 S.Ct. 1344 (1972) is whether a case is tried on the merits without objection to the question of subject matter jurisdiction. In the matter at bar, as objection was made by the filing of a timely Objection to Notice of Removal and the filing of a Motion to Remand, subject matter jurisdiction was not waived.

The Petitioner argues that the Plaintiff waived his objection to subject matter jurisdiction by not requesting leave to file an interlocutory appeal. However, this court has stated that existence of federal jurisdiction may be questioned at any point in the course of litigation and parties cannot waive the requirement of subject matter jurisdiction. *American Fire & Casualty Company v. Finn*, 341 U.S. 6 (1951).

The Respondent would submit that this court has already properly addressed the question of when subject matter jurisdiction is present and has adequately addressed the question of waiver of subject matter jurisdiction. Accordingly, the Respondent would submit that this case is not one which would merit the granting of a writ of certiorari by this court.

The Petitioner also raises the question of how the federal courts should deal with the question of derivative

claims. In the matter at bar, the derivative claims of the insurance carrier, Liberty Mutual Insurance Company, are claims which are determined by Kentucky law.

Under Kentucky Revised Statute 342.700–an insurance carrier has the right to file for its subrogation interest in the name of the Plaintiff. In the matter at bar, Liberty Mutual Insurance Company filed its claim for subrogation interest in the name of the Plaintiff, James David Lewis. Thus, under Kentucky law, James David Lewis was the Plaintiff seeking recovery of the subrogation interest of Liberty Mutual.

As noted, this was an alleged diversity action which was removed to federal court and practiced under state law. As the rights of the insurance carrier in this matter and therefore the derivative claims are determined by Kentucky law, the Respondent would submit that it would not be appropriate for this court to grant a writ of certiorari so as to review the applicability of Kentucky law to subrogation claims.

ARGUMENT

THE ALLEGED INCONSISTENCY BETWEEN THE CIRCUITS CONCERNING THE EXISTENCE OF SUBJECT MATTER JURISDICTION IN CASES REMOVED FROM STATE COURT DOES NOT MERIT THE GRANT OF A WRIT OF CERTIORARI BY THIS COURT.

Caterpillar, Inc. attempts to argue that as Whayne Supply settled its potential liability to Liberty Mutual Insurance Company after the removal of this case to

federal district court and therefore the Plaintiff and the Defendant were diverse at the time of trial, that subject matter jurisdiction did exist. While the Defendant, Caterpillar, Inc., has cited various cases in its attempt to support this position the Defendant has ignored a very important part of this test.

The rule as stated in *Grubbs v. General Electric Corporation*, 405 U.S. 697, 92 S.Ct. 1344, 1347 (1972), is

> "Longstanding decisions of this court make clear, however, that where after removal a case is tried on the merits *without objection* and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." (Emphasis added).

The defining point in the rule is that the case must have been removed without objection. In the matter at bar, such is not present. As previously noted, the Plaintiff filed an objection to the Notice of Removal and a Motion to Remand. Therefore, this case does not fit into the rule as argued by the Defendant, Caterpillar, Inc.

As stated by the United States Supreme Court, the jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. *American Fire & Casualty Company v. Finn*, 341 U.S. 6, 17-18 (1951). While the Defendant, Caterpillar, Inc., has argued that the Plaintiff waived his objection to subject matter jurisdiction by not filing an interlocutory appeal, "existence of federal jurisdiction may be questioned at any point in the course of

litigation and parties cannot waive the requirement of subject matter jurisdiction." *American Fire & Casualty Company v. Finn*, 341 U.S. 6, 17-18 (1951).

"When subject matter jurisdiction is predicated upon the diversity of the parties, citizenship of the parties is determined *at the time the action is commenced." Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F. 2d 445, 450 (6th Cir., 1988) (emphasis added). As noted by this court, at the time of the attempt to remove this case to the United States District Court, subject matter jurisdiction did not exist as there were non-diverse parties, namely, James David Lewis, a Kentucky resident, and Whayne Supply Company, a Kentucky corporation.

The rule in the Sixth Circuit as well as the rule enunciated by the United States Supreme Court is that where a party objects to removal based upon a lack of subject matter jurisdiction, then the opposing party has not waived the requirement of subject matter jurisdiction and the court will not accept jurisdiction where there is a lack of subject matter jurisdiction. In *Grubbs v. General Electric Corporation*, 405 U.S. 697 (1972), *American Fire & Casualty Corporation*, 341 U.S. 6 (1951), *Chivas Products Limited v Owen*, 864 F. 2d 1280 (1988), and *Riggs v. Island Creek Coal Company*, 542 F. 2d 339 (1976) no objection to subject matter jurisdiction was made.

Therefore, these cases are easily distinguishable on their face from the current action, as in the current action, the Plaintiff, James David Lewis, filed an objection to the Notice of Removal and also filed a Motion to Remand. Accordingly, as objection was made by the Plaintiff to the attempt to remove this claim to United States District

Court, this claim does not fit into the rule as cited by the Defendant. Therefore, subject matter jurisdiction was not waived by the Plaintiff, James David Lewis, and it was not appropriate for the district court to retain jurisdiction. Therefore, the decision of this court should be affirmed.

Caterpillar, Inc. argues that there is an acknowledged conflict among the circuits, as Caterpillar argues that the Fourth and Ninth Circuits require a party to file an interlocutory appeal from the denial of the Motion to Remand. However, a review of the cases cited by Caterpillar, Inc. indicate that the main thrust of decisions of the Fourth and Ninth Circuits is whether an objection was timely made to the removal, not merely whether an interlocutory appeal was filed.

In *Higgins v. E.I. DuPont de Nemours & Company*, 863 F. 2d 1162 (4th Cir., 1988) the Fourth Circuit found that the Plaintiffs did not object to removal at the time of said removal and only raised an objection subsequent to the district court's adverse rulings on the merits. The Fourth Circuit in *Higgins* stated that diversity must be established at the time of removal. In commenting on the Plaintiff's failure to object to the propriety of removal, the court stated that the failure to object to the propriety of removal in the first place seems more egregious than the failure to file an interlocutory appeal by the Plaintiff in *Able v. Upjohn Company*, 829 F. 2d 1330 (4th Cir., 1987), cert. denied, 485 U.S. 963 (1988).

In *Able*, the Fourth Circuit quoted the Tenth Circuit's decision in *Greenshields v. Warren Trading Corporation*, 248 F. 2d 61 (10th Cir., 1957), stating that the congressional desire to restrict removal has been understood to require

that doubts about the propriety of removal should be resolved in favor of retained state court jurisdiction.

While Caterpillar, Inc. argues that this court should grant certiorari so as to address this supposed conflict between the circuits, the Respondent, James David Lewis, would submit that this court has already adequately considered this issue. In both *Grubbs* and *American Fire & Casualty Company*, this court held that where a party objects to removal based upon a lack of subject matter jurisdiction, then said party has not waived the requirement of subject matter jurisdiction and the court will not accept jurisdiction where there is such a lack of subject matter jurisdiction. Accordingly, upon this ground, the Petition for Writ of Certiorari should be denied.

The Respondent would further point out that 28 U.S.C. Section 1292(b) (1995) states that when a district judge is of the opinion that there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the district judge shall so state in writing in such order. The Respondent would point out that no such statement was made by the district judge in his orders overruling the motion to remand and objection to removal from state court. Thus, the Respondent would submit that a request for interlocutory appeal would have been inappropriate and would therefore mandate against this court granting the Petition for Writ of Certiorari.

AS THE SUBROGATION CLAIMS OF THE INSURANCE CARRIER, LIBERTY MUTUAL INSURANCE COMPANY, WERE RAISED IN THE NAME OF THE PLAINTIFF, JAMES DAVID LEWIS, PURSUANT TO KENTUCKY LAW, THERE REMAINED NON-DIVERSE PARTIES ON EITHER SIDE OF THE ACTION IN FEDERAL COURT AND THEREFORE SUBJECT MATTER JURISDICTION DID NOT EXIST.

The Defendant, Caterpillar, Inc., argues that the claims of Liberty Mutual against Whayne Supply Company did not survive the settlement between James David Lewis and Whayne Supply Company and Whayne Supply Company was therefore not a proper party to this action when this matter was removed from federal court. However, the argument of the Defendant, Caterpillar, Inc., ignores the applicable law and the entire history of this case.

This case was practiced under Kentucky law and was removed to the district court under alleged diversity jurisdiction. KRS 342.700 provides:

> "(1) . . . If compensation is awarded under this chapter, the employer, its insurance carrier, the Special Fund, and the Uninsured Employers' Fund, or any of them, having paid the compensation or having become liable therefore, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expenses."

In accord with this statute, Liberty Mutual Insurance Company intervened in the name of the Kentucky resident, James David Lewis, and in its own name. Thus, non-diverse parties remained in this action while this claim was in the federal court, as James David Lewis is and was a Kentucky resident and Whayne Supply Company is a Kentucky corporation.

The Defendant, Caterpillar, Inc., would have this court ignore the complete history of this case in arriving at a conclusion that Whayne Supply Company should not have been involved in this case while this matter was pending in federal court. During the course of this action in federal court, claims of Liberty Mutual which were filed in the name of the Plaintiff, James David Lewis, continued to be litigated. This is reflected by the court's order of December 3, 1991 in which the court granted the motion of Liberty Mutual to amend the complaint so as to add a negligence claim on behalf of the Plaintiff, James David Lewis, against Whayne Supply Company. (Order, 12/31/91, NR 57).

The Defendant, Caterpillar, Inc., cites various Kentucky cases in its attempt to show that any claims of Liberty Mutual against Whayne Supply were extinguished when the partial settlement was entered into between the Plaintiff and Whayne Supply Company. However, these cases are easily distinguishable on their face and a reading of the complete case reflects that these cases do not stand for the point for which the Defendant, Caterpillar, Inc., attempts to argue.

In *Hillman v. American Mutual Liability Insurance Company*, 631 S.W. 2d 848 (KY 1982) the court addressed the

question of pro rata recovery between the insurance carrier and the Plaintiff where the third-party insurance coverage was not sufficient so as to cover the entire loss of the Plaintiff. The court held that the carrier was only subrogated to the portion of the judgment which was covered by workers' compensation benefits, that is, medical expenses and lost wages.

Ingersoll-Rand Company v. Rice, 775 S.W. 2d 924 (KY App, 1989) stands for the legal point that an insurance carrier is still entitled to subrogation regardless of the negligence of the employer. *Mastin v. Liberal Markets*, 674 S.W. 2d 7 (KY 1984) stands for the legal point that an insurance carrier is entitled to subrogation from a settlement with one defendant even where non-settling defendants remain. However, there was no question in Mastin concerning a situation which we have here, where the subrogation rights of Liberty Mutual Insurance Company were specifically reserved in the settlement agreement.

As reflected by the complete history of this case, Whayne Supply did remain a viable defendant upon removal of this case to the federal court and, as Whayne Supply was a Kentucky corporation, the claims of James David Lewis survived the settlement with Whayne Supply in state court and the claims of Liberty Mutual Insurance Company which were filed in the name of James David Lewis resulted in diversity not existing at the time of removal.

In the matter at bar, the question of the rights of a derivative party are governed by the applicable Kentucky law. As previously noted, under Kentucky law, an insurance carrier has the right to either file in its own name or

in the name of the Plaintiff. In the matter at bar, the insurance company chose to file in the name of the Plaintiff, James David Lewis.

As such claims were filed in the name of the Plaintiff, James David Lewis, and as the subrogation interests of the insurance carrier were not settled by James David Lewis in the state court action, these claims survived said settlement and the Plaintiff, James David Lewis, therefore retained certain claims against the Defendant, Whayne Supply Company, a Kentucky corporation, for amounts paid by Liberty Mutual Insurance Company pursuant to its policy of workers' compensation benefits.

The Sixth Circuit's ruling applies the appropriate Kentucky law and recognizes that under Kentucky law, James David Lewis, a Kentucky resident, retained certain viable claims against Whayne Supply Company, a Kentucky Corporation, when this matter was removed to federal court.

Caterpillar, Inc. attempts to argue that Whayne Supply Company was an unnecessary and dispensable party to the litigation and its presence should not be considered in ascertaining whether diversity jurisdiction existed. However, as previously noted, a review of this case indicates otherwise. Whayne Supply Company was an active party in the litigation after this matter was removed to federal court. Whayne Supply Company paid out over $600,000.00 in the state court action and the federal court action so as to settle the claims brought against Whayne Supply Company by the Plaintiff, James David Lewis. Thus, Whayne Supply Company was clearly not a unnecessary and dispensable party to this action.

The question of the survival of derivative claims in this matter is a question based upon Kentucky law. Accordingly, the Respondent, James David Lewis, would submit that such does not provide an appropriate basis for this court to grant a writ of certiorari. Accordingly, the Respondent would respectfully request that the Petition for Writ of Certiorari be denied.

CONCLUSION

The arguments of the Petitioner do not raise a conflict so substantial between the circuits so as to require this court to grant certiorari so as to resolve such. As the question concerning derivative claims is based upon Kentucky law, the Petitioner has not raised a sufficient basis upon which this court should grant certiorari so as to review such.

Respectfully submitted,

LEONARD J. STAYTON
Attorney at Law
P.O. Box 1386
Inez, Kentucky 41224
(606) 298-5117

Attorney for Respondent, James David Lewis

(3)

No. 95-1263

In the Supreme Court of the United States

OCTOBER TERM, 1995

CATERPILLAR INC., PETITIONER

v.

JAMES DAVID LEWIS, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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JOINT APPENDIX

KENNETH S. GELLER *
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
Counsel for Petitioner

LEONARD J. STAYTON *
P.O. Box 1386
Inez, Kentucky 41224
(606) 298-5117
Counsel for Respondent

* *Counsel of Record*

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1996
CERTIORARI GRANTED APRIL 15, 1996

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U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
Ashland Division

Civil Docket for Case #: 90-CV-84

LEWIS

v.

CATERPILLAR, INC., ET AL.

RELEVANT DOCKET ENTRIES*

DATE	PROCEEDINGS
6/21/90	Notice of Removal
6/21/90	Complaint
6/21/90	Answer by defendant Whayne Supply Company
6/21/90	Answer by defendant Caterpillar Inc.
6/21/90	Motion to intervene against Caterpillar Inc. and Whayne Supply Company
6/21/90	Intervenor's Complaint by intervenor plaintiff Liberty Mutual Insurance Group against Caterpillar Inc. and Whayne Supply Company
6/21/90	Answer by defendant Whayne Supply Company to Intervening Complaint
6/21/90	Answer by defendant Caterpillar Inc. to Intervening Complaint

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* For the Court's convenience, the docket entries set forth below have been revised and reworded by the parties to more accurately and clearly reflect the actual entries contained in the docket of the U.S. District Court for the Eastern District of Kentucky, Ashland Division.

DATE	PROCEEDINGS
6/21/90	Affidavit of defendant's counsel, Leslie W. Morris II
6/29/90	Objection of plaintiff to Notice of Removal
7/9/90	Memorandum of Caterpillar Inc. in opposition to plaintiff's objection to notice of removal
8/2/90	Motion of plaintiff to remand to Lawrence Circuit Court
8/7/90	Response of defendant Caterpillar Inc. in opposition to plaintiff's motion to remand
8/9/90	Supplemental response of defendant Caterpillar Inc. in opposition to plaintiff's motion to remand
8/26/90*	Order granting motion to intervene against Caterpillar Inc. and Whayne Supply Company
9/24/90	Order upon plaintiffs motion to remand to state court is DENIED; dismissing party Whayne Supply Company with prejudice and plaintiff shall take nothing thereby
1/23/91	Third-Party Complaint: by defendant Caterpillar Inc.; adding Gene Wilson Enterprises
2/19/91	Answer to Third Party Complaint by third-party defendant Gene Wilson Enterprises
7/19/91	Pretrial Memorandum by defendant Caterpillar Inc.
7/19/91	Witness list submitted by defendant Caterpillar Inc.
7/19/91	Exhibit list by defendant Caterpillar Inc.
7/22/91	Pretrial memorandum by intervenor plaintiff Liberty Mutual Insurance Group, third-party defendant Gene Wilson Enterprises

* This entry was improperly docketed by the clerk of the U.S. District Court, Eastern District of Kentucky, Ashland Division. The actual file date was 6/21/90.

DATE	PROCEEDINGS
7/22/91	Witness list submitted by intervenor plaintiff Liberty Mutual Insurance Group, third-party defendant Gene Wilson Enterprises
7/22/91	Exhibit list by intervenor plaintiff Liberty Mutual Insurance Group, third-party defendant Gene Wilson Enterprises
7/23/91	Order setting pretrial conference for 11:00 p.m. on 7/26/91
7/24/91	Pretrial Memorandum by defendant Wayne Supply Company and adopts the pretrial filings of Caterpillar Inc.
7/24/91	Supplement by defendant Caterpillar Inc. regarding documents pretrial memorandum
7/26/91	General Minutes
8/12/91	Order setting final pretrial conference for 3:30 p.m. on 1/31/92
8/19/91	Amendment by plaintiff James David Lewis of pretrial memorandum
8/21/91	Response by defendant Caterpillar Inc.
8/26/91	Amendment by intervenor plaintiff Liberty Mutual Insurance Group to pretrial memorandum
8/26/91	Motion of intervening plaintiff to amend complaint and to file cross-claim
9/3/91	Objection of plaintiff to intervening plaintiff's motion to file cross-claim
9/9/91	Objection of Whayne Supply Company to intervening plaintiff's motion to file amended intervening complaint
9/12/91	Reply of Liberty Mutual Insurance Group to Whayne Supply Company's objection to filing of cross-claim

DATE	PROCEEDINGS
9/12/91	Reply of Liberty Mutual Insurance Group to plaintiff's objection to filing of cross-claim
9/26/91	Response of Whayne Supply Company to intervening plaintiff's amendment to pretrial memorandum
12/3/91	Amended Intervenor's Complaint by Intervenor Plaintiff Liberty Mutual Insurance Group
12/3/91	Cross-claim by Liberty Mutual Insurance Group against James David Lewis
1/23/92	Answer by defendant Whayne Supply Company to Amended Intervening Complaint
1/28/92	Answer by defendant Caterpillar Inc. to Amended Intervening Complaint
1/29/92	Supplement by intervenor plaintiff Liberty Mutual Insurance Group, third-party defendant Gene Wilson Enterprises regarding exhibit list
1/31/92	Supplement by defendant Caterpillar Inc. regarding witness list
1/31/92	General Minutes
2/7/92	Answer by James David Lewis to cross-claim of Liberty Mutual Insurance Group
3/12/92	Order setting final pretrial conference for 2:00 p.m. on 3/20/92
3/16/92	Order setting final pretrial conference for 1:30 p.m. on 3/23/92
3/23/92	Witness list submitted by plaintiff James David Lewis
3/23/92	Exhibit list by plaintiff James David Lewis
3/23/92	General Minutes
4/23/92	Motion of Whayne Supply Company for Summary Judgment and Motion to Dismiss

DATE	PROCEEDINGS
5/15/92	Order amending General Minutes of 3/23/92
5/22/92	Memorandum of Liberty Mutual Insurance Group in Opposition to Whayne Supply Company's Motion for Summary Judgment and Motion to Dismiss
6/10/92	Reply of Whayne Supply Company to Liberty Mutual Insurance Group's Opposition to Summary Judgment and Motion to Dismiss
7/20/92	Memorandum Opinion and Order Denying Whayne Supply Company's Motion for Summary Judgment and Motion to Dismiss
11/3/92	Supplement by defendant Caterpillar Inc. regarding exhibit list
11/12/92	Pretrial Memorandum by plaintiff James David Lewis
11/12/92	Exhibit list by plaintiff James David Lewis
11/12/92	Witness list submitted by plaintiff James David Lewis
11/17/92	Supplement by plaintiff James David Lewis regarding exhibit list
6/8/93	Agreed Order by Judge Henry R. Wilhoit Jr. Intervening complaint dismissing party Whayne Supply Company as settled
7/21/93	Motion by defendant Caterpillar Inc. to exclude testimony of alleged similar incidents
7/23/93	Order setting jury trial for 9:00 a.m. on 11/15/93
7/29/93	Response by plaintiff James David Lewis to motion to exclude testimony of alleged similar incidents
7/29/93	Response by intervenor plaintiff Liberty Mutual Insurance Group to motion to exclude testimony of alleged similar incidents
8/10/93	Reply by defendant Caterpillar Inc. to response to motion to exclude testimony of alleged similar incidents

DATE	PROCEEDINGS
8/26/93	Remark all prior docketing and missing pleadings on hard docket
10/25/93	Order denying Caterpillar Inc.'s motion to exclude clude testimony of alleged similar incidents
11/3/93	Motion by plaintiff for leave to schedule time of expert witness testimony of Dr. John Hunt, Mr. John Tierney, and Dr. Williams Weitzel
11/3/93	Motion by defendant Caterpillar Inc. for attorney William F. Maready to appear pro hac vice
11/9/93	Order granting motion for leave to schedule time of expert witness testimony of Dr. John Hunt on 11/16/93 at 9:00 a.m., Mr. John Tierney on 11/16/93 at 11:00 a.m., and Dr. William Weitzel on 11/17/93 at 11:00 a.m.
11/9/93	Order granting motion for attorney William F. Maready to appear pro hac vice
11/15/93	Supplement by defendant regarding documents pretrial memorandum
11/16/93	Trial minutes
11/16/93	Deposition of John P. Tierney
11/17/93	Motion by defendant Caterpillar Inc.
11/17/93	Trial Minutes
11/17/93	Memorandum by defendant Caterpillar Inc. in support of motion for directed verdict
11/18/93	Portion of Transcript filed of testimony of Wayne Coloney
11/18/93	Trial Minutes
11/18/93	Stipulation of parties of amount of hospital and medical expenses
11/19/93	Transcript filed of testimony of Wayne Coloney during Jury Trial
11/22/93	Trial Minutes
11/22/93	Trial Minutes

Date	PROCEEDINGS
11/22/93	Exhibit list of Jury Trial on 11/15/93 through 11/22/93
11/22/93	Witness list of Jury Trial of 11/15/93 through 11/22/93
11/22/93	Trial Minutes
11/22/93	Verdict for defendant Caterpillar Inc.
11/23/93	Judgment
12/3/93	Motion by plaintiff for new trial
12/3/93	Memorandum by plaintiff in support of motion for new trial
12/15/93	Response by defendant Caterpillar Inc.
12/20/93	Motion by plaintiff to extend time to file reply
12/23/93	Transcript filed of testimony of Donald Myronuk
12/23/93	Transcript filed of Testimony of William Lux
12/23/93	Transcript filed of testimony of Joseph Geier
12/30/93	Transcript filed of testimony of James Light
1/3/94	Reply by plaintiff to response to motion for new trial
1/3/94	Order granting motion to extend time to file reply
1/6/94	Motion by defendant Caterpillar Inc. for leave to file repsonsive memorandum
1/14/94	Reply by defendant to response to plaintiff's reply memorandum for new trial
2/1/94	Order granting motion for leave to file responsive memorandum
2/23/94	Notice of Appeal by plaintiff James David Lewis
2/25/94	Notification to 6CCA: Short Record Mailed, Appeal Package Mailed to Appellant, Copy of Docket Sheet to Parties

LAWRENCE CIRCUIT COURT
Division No. I

C.A. No. 89-CI-091

JAMES DAVID LEWIS, PLAINTIFF

v

CATERPILLAR, INC. and
WHAYNE SUPPLY COMPANY, DEFENDANTS

COMPLAINT

Comes the Plaintiff, James David Lewis, by and through counsel, and for his Complaint herein, states as follows:

1. That the Plaintiff, James David Lewis, is a resident of Louisa, Lawrence County, Kentucky.

2. That the Defendant, Caterpiller, Inc., is a corporation with its agent for service of process being CT Corporation Systems, Kentucky Home Life Building, Louisville, Kentucky 40202.

3. The Defendant, Whayne Supply Company, is a corporation with its agent for service of process being Ernest Meadors, 1400 S. 43rd Street, Louisville, Kentucky 40211.

4. The Defendants have contracted to supply goods for services in this Commonwealth and/or further knew that such goods and/or services would be used, consumed, or would affect a person in this Commonwealth and the Defendants regularly do or solicit business and engage in a persistent course of conduct or derrive substantial revenue from goods used or consumed or services in this Commonwealth. Accordingly, this Court has sufficient basis so as to assert jurisdiction over the Defendants herein.

5. As the torts alleged herein were committed in Lawrence County, Kentucky this Court has the requisite jurisdiction and venue over this action.

6. On or about July 9, 1988 the Plaintiff, James David Lewis, was operating a Caterpiller D8K Tractor which had been manufactured and sold by the Defendant, Caterpiller, Inc. and which had been overhauled, serviced, and/or maintained by the Defendant, Whayne Supply Company. While in operation by the Plaintiff a hose ruptured, spraying hydraulic fluids on the engine and other parts of said machine, thereby creating a fire. As a result of this fire, the Plaintiff, James D. Lewis, was burned and was severely injured as a result of said fire.

7. The Defendant, Caterpiller, Inc., is in the business of designing, manufacturing, and/or selling such equipment and did design, manufacture, and/or sell the Caterpiller D8K Tractor which is the subject of this Complaint, which equipment was expected to and did reach the ultimate user, the Plaintiff, James David Lewis, without substantial change in its condition.

8. The fire and resulting injuries to the Plaintiff as complained of herein were the result of negligence on the part of the Defendant, Caterpiller, Inc.

9. The fire and resulting injuries to the Plaintiff as complained of herein were the result of a defect in the equipment which defect created an unreasonably dangerous condition, and which defect was present in the equipment at the time of its manufacture and sale by Caterpiller, Inc.

10. The fire and resulting injuries to the Plaintiff as complained of herein were the result of a failure of the Defendant. Caterpiller, Inc., to give proper and adequate warning of the dangerous condition of said equipment.

11. The Defendant, Whayne Supply Company, is in the business of overhauling, servicing, maintaining, and/or selling such equipment and did overhaul, service, maintain, and/or sell the Caterpiller D8K Tractor which is the subject of this Complaint, which equipment was expected to and did reach the ultimate user, the Plaintiff, James David Lewis, without substantial change in its condition.

12. The fire and resulting injuries to the Plaintiff as complained of herein were the result of negligence on the part of Whayne Supply Company.

13. The fire and resulting injuries to the Plaintiff as complained of herein were the result of a defect in the equipment, which defect created an unreasonably dangerous condition, and which defect was created at the time of the overhaul, service, and/or maintenance by Whayne Supply Company.

14. The fire and resulting injuries to the Plaintiff as complained of herein were the result of a failure of the Defendant, Whayne Supply Company, to give proper and adequate warning of the dangerous condition of the equipment.

15. The fire and resulting injuries to the Plaintiff as complained of herein were the result of a breach of both implied warranty and express warranty by both of the Defendants, Caterpiller Inc. and Whayne Supply Company.

16. As a result of the injuries complained of herein the Plaintiff has sustained reasonable and necessary medical and other related expenses, has sustained a loss of wages, both past and future, has sustained a permanent degree of impairment, has sustained much pain and suffering, has sustained mental anguish, and has sustained a general reduction in his quality of life.

17. As a result of the injuries complained of herein, the Plaintiff is likely to incur medical bills in the future,

will likely incur future loss of wages, will likely incur future pain and suffering, mental anguish, and will likely incur a general reduction in his quality of life in the future.

WHEREFORE, the Plaintiff, James David Lewis, demands judgment jointly and severally, from the Defendants, Caterpiller, Inc. and Whayne Supply Company, as follows:

1. Compensatory damages in an amount in excess of $4,000.00 reasonably calculated so as to recompense the Plaintiff for his losses herein;

2. Punitive damages in an amount in excess of $4,000.00 reasonably calculated so as to deter the Defendants from further like actions as were taken in this matter;

3. Pre-judgment and post-judgment interest;

4. Reimbursement of all of the Plaintiff's costs incurred herein, including, but not limited to, a reasonable attorney's fee;

5. A trial by jury; and

6. Any and all other relief to which the Plaintiff may appear entitled.

Respectfully submitted,

/s/ Leonard Stayton
LEONARD STAYTON
Attorney at Law
P.O. Box 246
Inez, Kentucky 41224

LAWRENCE CIRCUIT COURT

[Caption Omitted]

ANSWER OF DEFENDANT, WHAYNE SUPPLY COMPANY

Comes now the defendant, Whayne Supply Company, by counsel, and for its Answer to the plaintiff's Complaint herein states as follows:

1. Plaintiff's Complaint as a whole and each respective claim therein fails to state a claim upon which relief may be granted.

2. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1 and 2 of plaintiff's Complaint, and therefore deny same.

3. This defendant admits the allegations contained in Paragraph 3 of plaintiff's Complaint.

4. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Pargraphs 4 and 5 of plaintiff's Complaint, and therefore deny same.

5. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 6 and 7 of plaintiff's Complaint, and therefore deny same.

6. In response to Pargraphs 8, 9, and 10 of plaintiff's Complaint, this defendant is unable to admit or deny the allegations directed to defendant Caterpillar, Inc., except as any such allegations may be relevant or material to any claim against this defendant, each and every allegation contained therein is denied.

7. This defendant admits as much of Paragraph 11 of plaintiff's Complaint as alleges defendant Whayne Supply Company "is in the business of overhauling, servicing, maintaining and/or selling" equipment such as a Caterpillar D8K Tractor, but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11, and therefore denies same.

8. This defendant denies each and every allegation contained in Paragraphs 12, 13, and 14 of plaintiff's Complaint.

9. In response to Paragraph 15 of Plaintiff's Complaint, this defendant is unable to admit or deny the allegations directed to defendant Caterpillar, Inc., and denies each and every allegation contained in Paragraph 15 as directed to Whayne Supply Company.

10. This defendant denies each and every allegation contained in Paragraphs 16 and 17 of plaintiff's Complaint.

11. This defendant affirmatively states and alleges that the plaintiff's alleged injuries and damages, if any, were directly caused and contributed to by his own negligence in whole or in part, but for which said alleged injuries and damages, if any, would not have occurred.

12. This defendant affirmatively states and alleges that the plaintiff's injuries and damages, if any, were directly caused or contributed to by acts of third persons, and were further directly caused and contributed to by acts of third persons not parties to this action, and said acts of third persons were superseding causes of the injuries herein alleged.

13. This defendant affirmatively states and alleges that the plaintiff's claims herein are barred in whole or in part by the Kentucky Products Liability Act.

WHEREFORE, defendant, Whayne Supply Company, demands judgment that the plaintiff's Complaint against it be dismissed with prejudice, for its costs herein expended, and for all other and proper relief to which it may be entitled.

BOEHL STOPHER GRAVES
& DEINDOERFER

By: /s/ Robert M. Brooks
ROBERT M. BROOKS
Suite 2300
One Riverfront Plaza
Louisville, KY 40202
(502) 589-5980
Counsel for Defendant,
Whayne Supply Co.

[Certificate of Service Omitted]

LAWRENCE CIRCUIT COURT

[Caption Omitted]

ANSWER OF DEFENDANT CATERPILLAR, INC.

Comes the defendant, Caterpillar, Inc., and, for Answer to the Complaint herein, states and alleges as follows:

FIRST DEFENSE

The Complaint fails to state a claim against defendants upon which relief in the form of punitive damages can be granted.

SECOND DEFENSE

1. This answering defendant, partly upon information and belief, admits the allegations contained in numerical paragraphs 1, 2, 3, and 5 of the Complaint, and admits the allegations contained in numerical paragraph 4 thereof to the extent that it admits jurisdiction and that it does and is authorized to transact business in the Commonwealth.

2. This answering defendant, upon information and belief, admits so much of the allegations contained in numerical paragraph 6 of the Complaint as allege that on or about July 9, 1988, the plaintiff was operating a Caterpillar D8K tractor which had been manufactured and sold by this answering defendant, that hydraulic fluids were allegedly released from a hose, that a fire occurred and that the plaintiff sustained burns.

3. This answering defendant admits so much of the allegations contained in numerical paragraph 7 of the

Complaint as allege that this answering defendant is in the business of designing, manufacturing and/or selling equipment and did design, manufacture and sell to a first consumer the tractor mentioned in the Complaint, but this answering defendant denies that the tractor reached the plaintiff without substantial change in its original condition.

4. This answering defendant admits so much of the allegations contained in numerical paragraph 11 of the Complaint as allege that the defendant, Whayne Supply Company, is in the business of overhauling, servicing and maintaining equipment such as is mentioned in the Complaint and did sell the subject tractor, but this answering defendant denies that the tractor reached the plaintiff without substantial change in its original condition.

5. This answering defendant denies the allegations contained in numerical paragraphs 8, 9 and 10 of the Complaint and so much of the allegations contained in numerical paragraph 15 thereof as allege that the fire and injuries to the plaintiff were a result of a breach of implied or expressed warranties on the part of this answering defendant.

6. This answering defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the remaining allegations contained in the Complaint, and specifically denies any and all allegations contained in the Complaint that state or infer that the subject tractor, at the time of original manufacture and delivery, was defective, unfit or unsafe for the purposes for which the tractor was intended to be used, and this answering defendant specifically denies any breach of warranties, negligence or liability on its part.

THIRD DEFENSE

The plaintiff was guilty of negligence and carelessness which was a substantial cause of the occurrence and alleged damages mentioned in the Complaint herein and

the negligence, fault and failure on his part to exercise ordinary care in the circumstances constitutes a complete bar to the plaintiff's claims for damages herein pursuant to KRS 411.320(3).

FOURTH DEFENSE

For further defense herein, this answering defendant states that the injury alleged in the Complaint occurred more than five (5) years after the date of sale of the subject tractor to the first consumer; and, accordingly, this answering defendant pleads and relies upon the presumption that the subject product was not defective, as provided in KRS 411.310(1).

FIFTH DEFENSE

For further defense herein, this answering defendant states and alleges that the design, methods of manufacture, and testing of the subject product conformed to the generally recognized and prevailing standards or the state-of-the-art in existence at the time the design was prepared and the product was manufactured; and, accordingly, this answering defendant pleads and relies upon the presumption that the product was not defective, as provided by KRS 411.310(2).

SIXTH DEFENSE

For further defense herein, this answering defendant states that the injury alleged in the Complaint would not have occurred if the product had been used in its original, unaltered and unmodified condition; and this answering defendant pleads and relies upon the provisions of the Product Liability Act of Kentucky, including KRS 411.320 and other applicable provisions of the Act.

SEVENTH DEFENSE

For further defense herein, this answering defendant states and alleges that the plaintiff's claims predicated

upon this answering defendant's alleged breach of implied warranty and breach of express warranty are barred by the limitations provisions of KRS 355.2-725 and by the terms of the express warranty which provides the remedies available under the written warranty and further provides in conspicuous words that the written warranty is expressly in lieu of any other warranties, express or implied, including any warranty of merchantability or fitness for a particular purpose, KRS 355.2-316(2); and that said claims are further barred by the provisions of KRS 355.2-318 and other applicable law.

WHEREFORE, the defendant, Caterpillar, Inc., demands that the Complaint be dismissed as against it; prays for its costs herein expended and for all further and proper relief to which it may appear entitled.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar, Inc.

[Certificate of Service Omitted]

COMMONWEALTH OF KENTUCKY
LAWRENCE CIRCUIT COURT

[Caption Omitted]

INTERVENING COMPLAINT OF LIBERTY MUTUAL INSURANCE GROUP

Comes Intervening Plaintiff, Liberty Mutual Insurance Group, by counsel, and for its Intervening Complaint against defendants, Caterpillar, Inc. and Whayne Supply Company, and each of them, states as follows:

1. Intervening plaintiff, Liberty Mutual Insurance Group, is an authorized insurer commissioned to transact business within the Commonwealth of Kentucky, and at all times pertinent hereto, provided Workers' Compensation insurance to plaintiff's employer, Gene Wilson Enterprises.

2. On or about July 9, 1988, in Lawrence County, Kentucky, plaintiff, James David Lewis, was an employee of Gene Wilson Enterprises and was acting within the course and scope of his employment with said employer.

3. Intervening plaintiff provided Workers' Compensation coverage to plaintiff's employer and at the time and on the occasion of said accident, plaintiff and this intervening plaintiff had both elected to and were operating under the provisions of the Workers' Compensation Act of the Commonwealth of Kentucky.

4. On the aforesaid date and occasion, plaintiff, James David Lewis, was operating a D-8K dozer manufactured by Caterpillar, when said dozer malfunctioned and caught fire causing personal injuries to plaintiff, James David Lewis, as more specifically alleged in plaintiff's Complaint

filed herein, which is incorporated herein by reference as if set out fully.

5. At all times material hereto, the defendant, Caterpillar, was engaged in the business of designing, manufacturing, selling, marketing, distributing, supplying and/or otherwise placing into the stream of commerce heavy equipment and machinery, including the dozer model D-8K which is the subject of this action.

6. The defendant, Whayne Supply Company, is and was at all times material hereto engaged in the business of repairing, and maintaining heavy equipment and selling, supplying and distributing parts and materials for said equipment and more specifically providing parts and materials and performing repairs to and maintenance on Caterpillar dozers and equipment, including the dozer previously referred to and which is the subject of this action.

7. The aforesaid Caterpillar dozer, model D-8K, that caused plaintiff's injuries and the injuries complained of were the result of carelessness and negligence of defendant, Caterpillar, its agents, servants, and employees and were further the result of breaches and violations of duties owed by defendants to plaintiff.

8. From the time the aforesaid dozer left the manufacturer, it was in a defective and unreasonably dangerous condition and as such, defendant, Caterpillar is strictly liable to plaintiff for his injuries and to this intervening plaintiff for medical and compensation benefits paid to and on behalf of plaintiff.

9. As a direct and proximate result of the carelessness and negligence of defendant, Caterpillar, and the unreasonably dangerous condition of the dozer at the time it was manufactured, sold and distributed, plaintiff sustained serious and permanent injuries and by virtue of same, this intervening plaintiff is required to and has paid through September 3, 1989 to or on behalf of plaintiff, James

David Lewis, the sum of $20,492.89 as temporary total disability benefits, and is continuing to pay plaintiff the sum of $333.57 per week for temporary total disability benefits, and has also paid on plaintiff's behalf $138,253.96 in medical expenses, as required by the Workers' Compensation Act of the Commonwealth of Kentucky and will be required to pay plaintiff additional Workers' Compensation disability benefits and medical expenses incurred by him as a result of injuries he sustained on July 9, 1988.

10. The aforesaid Caterpillar dozer, Model D-8K, that caused plaintiff's injuries and the injuries complained of were the result of the carelessness and negligence of defendant, Whayne Supply, its agents, servants and employees and breaches and violations of duties owed by it to plaintiff.

11. From the time the aforesaid dozer left the manufacturer and while in the possession of and at the time it was sold by defendant, Whayne Supply, said dozer was in a defective and unreasonably dangerous condition, and, as such, defendant, Whayne Supply, is strictly liable to plaintiff for his injuries and to this intervening plaintiff for medical and compensation benefits paid to and on behalf of plaintiff.

12. As a direct and proximate result of the carelessness and negligence of defendant, Whayne Supply, by which said dozer was sold, distributed, maintained and serviced and its unreasonably dangerous condition at the time sold and distributed, plaintiff sustained serious and permanent injuries, and by virtue of same, this intervening plaintiff is required to and has paid through September 3, 1989 to or on behalf of plaintiff, James David Lewis, and is continuing to pay plaintiff the sum of $20,492.89 as temporary total disability benefits and is continuing to pay plaintiff the sum of $333.57 per week for temporary total disability benefits, and has also paid on plaintiff's behalf $138,253.96 in medical expenses, as required by the Workers' Compensation Act of the Com-

monwealth of Kentucky and will be required to pay plaintiff additional Workers' Compensation disability benefits and medical expenses incurred by him as a result of injuries he sustained on July 9, 1988.

13. In accordance with the provisions of KRS 342.700 and all other applicable law, this intervening plaintiff is entitled to recover from defendants, Caterpillar and Whayne Supply, and each of them, all Workers' Compensation benefits, including medical expenses, paid or payable by this intervening plaintiff to or on behalf of plaintiff, James David Lewis.

14. In the alternative, this intervening plaintiff is entitled to judgment against defendants, Caterpillar, Inc. and Whayne Supply Company, on the basis of common law and statutory indemnity, for any and all sums which it has been, and will in the future be, compelled or required by law to pay to or on behalf of plaintiff, James David Lewis, as a result of the injuries sustained by him on July 9, 1988.

WHEREFORE, intervening plaintiff, Liberty Mutual Insurance Group, requests that it be awarded judgment granting indemnity, common law and/or statutory, from defendants Caterpillar, Inc. and Whayne Supply Company, jointly and severally, for all sums paid or payable as Workers' Compensation benefits to or on behalf of plaintiff, James David Lewis, interest on all sums paid and to be paid; for its costs herein expended; and for all other relief to which it may be entitled.

OGDEN, STURGILL & WELCH
Bank of Ashland
1422 Winchester Avenue
P.O. Box 1653
Ashland, Kentucky 41105-1653

By: /s/ Peggy E. Purdom
PEGGY E. PURDOM
PHILLIP M. MOLONEY

Attorneys for Intervening Plaintiff,
Liberty Mutual Insurance Group

[Certificate of Service Omitted]

COMMONWEALTH OF KENTUCKY
LAWRENCE CIRCUIT COURT

[Caption Omitted]

ORDER

This matter having come before the Court upon the Motion of Liberty Mutual Insurance Group for Leave to File Intervening Complaint, and to issue Summons thereon; and the parties having had the opportunity to be heard; and the Court being otherwise sufficiently advised

IT IS HEREBY ORDERED AS FOLLOWS:

(1) Intervening plaintiff's Liberty Mutual Insurance Group, Motion for Leave to Intervene in this action is sustained and the Clerk of this Court is directed to file the tendered Intervening Complaint in this action as of the date of this Order.

(2) The Clerk is hereby directed to issue Summons upon the intervening Complaint to defendants Caterpillar, Inc. and Whayne Supply Company.

(3) All future pleadings in this action shall reflect Liberty Mutual Insurance Group as an intervening plaintiff and party to this action.

This 13th day of October, 1989.

/s/ Stephen N. Frazier
Judge
Lawrence Circuit Court

[Certificate of Service Omitted]

COMMONWEALTH OF KENTUCKY
LAWRENCE CIRCUIT COURT

[Caption Omitted]

ANSWER OF DEFENDANT, CATERPILLAR INC., TO INTERVENING COMPLAINT

Comes the defendant, Caterpillar Inc., and, for Answer to the Intervening Complaint of Liberty Mutual Insurance Group, states and alleges as follows:

FIRST DEFENSE

1. This answering defendant, partly upon information and belief, admits the allegations contained in numerical paragraphs 1, 2, 3 and 6 of the Intervening Complaint, and admits the allegations contained in numerical paragraph 5 thereof to the extent that it admits jurisdiction and that it does and is authorized to transact business in the Commonwealth.

2. This answering defendant denies the allegations contained in numerical paragraph 4 of the Complaint to the extent that it denies that the subject tractor malfunctioned, and, for further response, it incorporates herein by reference the allegations and defenses set forth in its Answer to the Complaint herein.

3. This answering defendant denies the remaining allegations contained in the Complaint as pertain to it and which state or infer that the subject tractor, at the time of original manufacture and delivery, was defective, unfit or unsafe for the purposes for which the tractor was intended to be used, and this answering defendant specifically denies any breach of warranties, negligence or liability on its part.

4. This answering defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the other remaining allegations contained in the Complaint.

SECOND DEFENSE

For further response to numerical paragraphs 13 and 14 as pertain to it, and by way of additional response and answer to the Intervening Complaint generally, this answering defendant states that for the reasons asserted in its Answer to the plaintiff's Complaint herein, all of which are hereby adopted and reaffirmed, this defendant has incurred no legal liability to pay damages to the plaintiff and, therefore, this defendant has no legal liability to the intervening plaintiff pursuant to KRS 342.700 or otherwise.

WHEREFORE, the defendant, Caterpillar Inc., prays that the Intervening Complaint be dismissed as against it; prays for its costs herein expended and for all further and proper relief to which it may appear entitled.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

COMMONWEALTH OF KENTUCKY
LAWRENCE CIRCUIT COURT

[Caption Omitted]

ANSWER OF DEFENDANT, WHAYNE SUPPLY COMPANY TO INTERVENING COMPLAINT

Comes now the defendant, Whayne Supply Company, by counsel, and for its answer to the Intervening Complaint of Liberty Mutual Insurance Group herein states as follows:

1. Plaintiff's Intervening Complaint as a whole and each respective claim therein fails to state a claim upon which relief may be granted.

2. This defendant adopts and incorporates herein by reference each and every defense and affirmative defense set forth in its original Answer to plaintiff's Complaint herein.

3. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1, 2, and 3 of the Intervening Complaint, and therefore denies same.

4. This defendant denies each and every allegation contained in Paragraph 4 of the Intervening Complaint.

5. In response to Paragraph 5 of the Intervening Complaint, this defendant is unable to admit or deny the allegations directed to defendant Caterpillar, Inc., except as any such allegations may be relevant or material to any claim against this defendant, each and every allegation contained therein is denied.

6. This defendant admits as much of Paragraph 6 of the Intervening Complaint as alleges defendant Whayne Supply Company is "engaged in the business of repairing, and maintaining heavy equipment and selling, supplying and distributing parts and materials for said equipment and more specifically providing parts and materials and performing repairs to and maintenance on Caterpillar dozers and equipment," but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6, and therefore denies same.

7. In response to Paragraphs 7, 8, and 9 of the Intervening Complaint, this defendant is unable to admit or deny the allegations directed to defendant, Caterpillar, Inc., except as any such allegations may be relevant or material to any claim against this defendant, each and every allegation contained therein is denied.

8. This defendant denies each and every allegation contained in Paragraphs 10, 11, and 12 of the Intervening Complaint.

9. In response to Paragraphs 13 and 14 of the Intervening Complaint, this defendant is unable to admit or deny the allegations directed to defendant Caterpillar, Inc., and denies each and every allegation contained in Paragraphs 13 and 14 directed to Whayne Supply Company.

10. This defendant affirmatively states and alleges that the plaintiff's alleged injuries and damages, if any, were directly caused and contributed to by his own negligence in whole or in part, but for which said alleged injuries and damages, if any, would not have occurred.

11. This defendant affirmatively states and alleges that the plaintiff's injuries and damages, if any, were directly caused or contributed to by acts of third persons, and were further directly caused and contributed to by acts of third persons not parties to this action, and said acts of

third persons were superseding causes of the injuries herein alleged.

12. This defendant affirmatively states and alleges that the plaintiff's claims herein are barred in whole or in part by the Kentucky Products Liability Act.

13. This defendant affirmatively states and alleges that this defendant has incurred no legal liability to pay damages to the plaintiff, and therefore, this defendant has no legal liability to the Intervening Plaintiff pursuant to KRS 342.700 or otherwise.

WHEREFORE, defendant, Whayne Supply Company, demands judgment that the Intervening Complaint against it be dismissed with prejudice, that the plaintiff's Complaint against it be dismissed with prejudice, for its costs herein expended, and for all other and proper relief to which it may be entitled.

BOEHL STOPHER GRAVES
& DEINDOERFER

By: /s/ Robert M. Brooks
ROBERT M. BROOKS
Suite 2300
One Riverfront Plaza
Louisville, KY 40202
(502) 589-5980

Counsel for Defendant,
Whayne Supply Company

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

C.A. No. 90-84

JAMES DAVID LEWIS, PLAINTIFF

and

LIBERTY MUTUAL INSURANCE GROUP,
INTERVENING PLAINTIFF

vs.

CATERPILLAR, INC., DEFENDANT

NOTICE OF REMOVAL

Comes the defendant, Caterpillar Inc., and, for its Notice of Removal, states as follows:

1. On June 22, 1989, a civil action was commenced by Complaint of James David Lewis against Caterpillar Inc. and Whayne Supply Company, defendants, in the Lawrence Circuit Court, Lawrence County, Kentucky, said action being designated as Civil Action No. 89-CI-091.

2. Caterpillar Inc. was served with a copy of the summons and Complaint on the 27th day of June, 1989. Copies of all process pleadings and orders served upon it in such action are attached hereto and incorporated by reference herein.

3. The defendant, Caterpillar Inc., is and was at all times referred to in the said Complaint, at the time the said action was commenced, at all intervening times, and

is now, a corporation incorporated by the State of Delaware, maintaining its principal place of business in the State of Illinois, and being a citizen of the States of Delaware and Illinois and of no other state. Caterpillar, Inc. is not now and has never been a citizen of the State of Kentucky.

4. The plaintiff, James David Lewis, is and was at all times referred to in said Complaint, at the time the said action was commenced, at all intervening times, and is now, a citizen of the State of Kentucky and of no other state. The said plaintiff is not now and was not at any of said times a citizen of the States of Delaware, Illinois or Massachusetts.

5. The case stated by the initial pleading was not removable because Whayne Supply Company was named as a defendant, together with Caterpillar Inc. Whayne Supply Company is and was at all times referred to in the said Complaint, at the time the said action was commenced, at all intervening times, as is now, a corporation incorporated by the State of Kentucky, maintaining its principal place of business in the State of Kentucky, and being a citizen of the State of Kentucky and of no other state.

6. The intervening plaintiff, Liberty Mutual Insurance Group, intervened in the action to assert a derivative subrogation claim against the defendants, Caterpillar Inc. and Whayne Supply Company, for reimbursement of workers' compensation benefits and medical expenses paid and payable to the plaintiff. Liberty Mutual Insurance Group is and was at all times, at the time its action was commenced, at all intervening times, and is now, a corporation incorporated by the State of Massachusetts, maintaining its principal place of business in the State of Massachusetts and being a citizen of the State of Massachusetts and of no other state.

7. On June 12, 1990, the defendant, Caterpillar Inc., by counsel, first learned and ascertained that the plaintiff

had voluntarily settled with the non-diverse defendant, Whayne Supply Company, and that the plaintiff's claim against said defendant was to be dismissed, reference being made to said counsel's affidavit which is attached hereto and incorporated herein. This case is now one which has become removable. The defendant, Caterpillar Inc., by counsel, has requested an amended pleading, motion, order or other paper evidencing in writing the plaintiff's settlement and dismissal or its intention to voluntarily terminate its action against the defendant, Whayne Supply Company, but no such writing has been received to date. This and the circumstances creating removability are beyond the control of Caterpillar Inc. The defendant, Caterpillar Inc., has acquired requisite knowledge of the change of circumstances warranting removal and cannot prudently wait any longer to remove in view of the one year limitation on removal based on diversity jurisdiction which is imposed by 28 U.S.C. § 1446(b).

8. The amount in controversy exceeds the sum of Fifty Thousand and No/100 ($50,000.00) Dollars, exclusive of interest and costs.

9. This Notice of Removal is filed within thirty (30) days after the defendant, Caterpillar Inc., first ascertained that the case is one which has become removable and is filed less than one year after commencement of the action, and may be removed to this Court pursuant to 28 U.S.C. §§ 1332, 1441 and 1446(b).

WHEREFORE, Caterpillar Inc., prays that the said Civil Action No. 89-CI-091 in the Lawrence Circuit Court, be removed therefrom to the United States District Court for the Eastern District of Kentucky and proceed as an action properly removed hereto.

LESLIE W. MORRIS II
STOLL, KENNON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

AFFIDAVIT

Comes Leslie W. Morris, II, after being duly sworn, and states as follows:

1. He is the attorney of record for the defendant, Caterpillar Inc., in Civil Action No. 89-CI-091, in the Lawrence Circuit Court, Lawrence County, Kentucky, and is duly authorized to act on behalf of the defendant, Caterpillar Inc., in filing the Notice of Removal of said action to the United States District Court for the Eastern District of Kentucky.

2. The statements made in the Notice of Removal are true and correct.

3. On Tuesday, June 12, 1990, this affiant received a telephone call in his office from Dave Bauer, of GAB Business Services, Inc., 2235 Enterprise Drive, Suite 3504, Westchester, Illinois 60154. Mr. Bauer had attended a deposition in this case on April 30, 1990, and stated at that time that he was in attendance as a duly authorized representative of Whayne Supply Company, a defendant in the aforesaid state action. Hon. Edward H. Stopher, attorney of record for said defendant, Whayne Supply Company, who was present at said deposition, confirmed that Mr. Bauer was such a representative. In the conversation of June 12, 1990, Mr. Bauer informed this affiant that Whayne Supply Company had effected a separate settlement with the plaintiff, James David Lewis.

4. On June 15, 1990, this affiant had a telephone discussion with Mr. Stopher who at that time had not had an opportunity to speak with Mr. Bauer; however, Mr. Stopher indicated that he had received several telephone calls from Mr. Bauer, while he (Mr. Stopher) was out of the office, and he had also learned that Whayne Supply Company had probably effected a separate settlement with the plaintiff. Mr. Stopher indicated that he would inquire in this regard and that, if this was the case, depositions scheduled for June 21, 1990, by Whayne Supply Company would be cancelled. This affiant asked for prompt confirmation in writing of the settlement and has repeated this request in a letter to Mr. Stopher dated June 15, 1990. The defendant, Caterpillar Inc., and this affiant, have not received any such writing to date but, on the afternoon of June 15, 1990, Mr. Stopher's office left word at the affiant's office that the depositions scheduled on June 21, 1990, were cancelled. This affiant expects to receive an order or other writing evidencing and confirming that the defendant, Whayne Supply Company, has effected a settlement with the plaintiff. This affiant has no reason to doubt or disbelieve the oral representations that such a settlement has been agreed upon.

LESLIE W. MORRIS II

[Jurat omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

OBJECTION TO NOTICE OF REMOVAL

Comes the Plaintiff, James David Lewis, by and through counsel, and would object to the removal of this action from the Lawrence Circuit Court, Lawrence County, Kentucky. As basis therefor, the Plaintiff, James David Lewis, would state that this Court does not have jurisdiction over the parties to this action as there is not complete diversity between the parties hereto.

Pursuant to 28 U.S.C. Section 1332 complete diversity must exist between all parties for a United States District Court to have jurisdiction of the action. In the matter at bar while the Defendant, Caterpillar, Inc., is correct that the Plaintiff has settled its claims with the Defendant, Whayne Supply Company, the claims of the Intervening Plaintiff, Liberty Mutual Insurance Group, have not been settled between Liberty Mutual Insurance Company and Whayne Supply Company. Accordingly, as Whayne Supply Company remains a party to this action and as Whayne Supply Company is a Kentucky resident diversity jurisdiction does not exist between all parties hereto.

The Plaintiff would further point out that Liberty Mutual Insurance Group is a party to this action, being an Intervening Plaintiff herein. The party whom Liberty Mutual Insurance Group insures in this matter is Gene Wilson and/or Gene Wilson Enterprises, which entity is a resident and/or is incorporated in the state of Kentucky.

Pursuant to 28 U.S.C. Section 1332 in an action where the insured is not a party the insurer is deemed to be a citizen of the state of which the insured is a citizen. Therefore, Liberty Mutual Insurance Group is deemed to be a citizen of the state of Kentucky and as Liberty Mutual Insurance Group retains a claim against Whayne Supply Company herein as reflected by the Intervening Complaint of Liberty Mutual Insurance Group, a copy of which has been attached to the Notice of Removal, there is not complete diversity between the Plaintiffs and the Defendants herein and this matter is not subject to removal as this Court does not have jurisdiction over the subject matter herein.

The Plaintiff would further submit that this matter is not ripe for removal and that the Defendant, Caterpillar, Inc., has no basis upon which to move for removal herein. 28 U.S.C. Section 1446 provides that removal may be had by a Defendant within thirty (30) days of the service of a copy of an initial pleading or within thirty (30) days after receipt by the Defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable. As the Defendant, Caterpillar, Inc., sets out in its pleadings which have been filed herein, no papers or orders have been received by the Defendants' counsel from which the Defendant, Caterpillar, Inc., would be able to ascertain that this is an action which would be removable. Accordingly, as the Defendant, Caterpillar, Inc., has not received the requisite pleadings or orders from which it would be able to deem this matter removable the Defendant, Caterpillar, Inc., has no standing upon which to request removal of this action. Accordingly, for the reasons cited hereinabove, the Plaintiff would respectfully request that removal be denied and that this matter be remanded to the Lawrence Circuit Court, Lawrence County, Kentucky.

Respectfully submitted,

/s/ Leonard Stayton
LEONARD STAYTON
Attorney at Law
P.O. Box 1386
Inez, Kentucky 41224

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

MEMORANDUM OF CATERPILLAR INC. IN OPPOSITION TO PLAINTIFF'S OBJECTION TO REMOVAL

MAY IT PLEASE THE COURT:

The removal in this case was proper and this Memorandum is submitted in opposition to the plaintiff's objection to removal and/or motion to remand.

I

First, the plaintiff contends that since Whayne Supply Company ("Whayne Supply") allegedly remains in the case as a defendant on the Intervening Complaint of Liberty Mutual Insurance Group ("Liberty Mutual"), there is not complete diversity between "the Plaintiffs" and "the Defendants." In the first place, the action by the plaintiff, as asserted in the Complaint, is now between citizens of different states. The intervening action by Liberty Mutual is between citizens of different states. In addition, the claims interposed by the Intervening Complaint are ancillary to the main action asserted in the Complaint. The primary purpose of an intervention by a workers' compensation carrier, such as Liberty Mutual, is to assert a subrogation right in the plaintiff's recovery. In the usual case the insurance company is not identified at and does not even participate in the trial.

The Commentary on the 1988 Revision of § 1447 discusses the ancillary jurisdiction doctrine which comes

into play when a plaintiff's claim satisfies diversity but a claim interposed by some other party does not. Again, it should be noted that there is in fact diversity on the Intervening Complaint in this case but the plaintiff in effect wants to move the defendant, Whayne Supply, from one column to another, namely from the Intervening Complaint back to the Complaint. In any event, even if the intervening claim is not measured by itself there is still federal jurisdiction because of the "relatedness" of such claim to the main claim. See 28 U.S.C.A. § 1447, Commentary, 1989 Supplement. Such cases as *Mancari* v. *AC & S Co., Inc.*, 683 F.Supp. 91 (D.Del. 1988), present situations analogous to the one at bar. There the plaintiff had settled with the non-diverse defendants but claimed that the case was not removable because several of the non-diverse defendants remained in the action on the diverse defendant's cross-claims. The Court found that the case was in fact removable, and that the non-diverse defendants should be realigned as third-party defendants. In so holding, the Court at 93 made several statements that are germane to this matter:

> When a plaintiff voluntarily enters into a settlement with all nondiverse defendants leaving only a diverse defendant in the action, the plaintiff is deemed to have given up its right to choose the forum of the action. * * * It is not required that dismissal of the nondiverse defendants be in writing or be formalized. * * * Since the defendant's claims against third party defendants are within the court's ancillary jurisdiction, it is not necessary to find an independent basis of jurisdiction if diversity exists between the plaintiff and the remaining non-settling defendant.

See also *King Fisher Marine Service* v. *Hanson Development*, 717 F.Supp. 727 (D.Kan. 1987).

However, if this Court should believe that Whayne Supply's continued presence as a purported defendant

on the Intervening Complaint is material to diversity jurisdiction, then some inquiry needs to be made as to the circumstances of plaintiff's settlement with Whayne Supply which would still leave open the claim of Liberty Mutual against Whayne Supply. Even though plaintiff's settlement was only partial, i.e., with Whayne Supply, Liberty Mutual is entitled to immediate statutory subrogation as to such amount of the settlement as duplicates workers' compensation benefits and the settling parties are not allowed to unilaterally structure the settlement so as to artificially exclude those elements of damages. *Mastin* v. *Liberal Markets*, Ky., 674 S.W.2d 7 (1984). For the reasons herein stated, this Court should not need to make such an inquiry but, suffice it to say, no parties should be allowed to manipulate or manufacture either diversity or non-diversity.

II

The plaintiff next states that 28 U.S.C. § 1332 provides that "in an action where the insured is not a party the insurer is deemed to be a citizen of the state of which the insured is a citizen." According to the plaintiff, Liberty Mutual's insured is Gene Wilson and/or Gene Wilson Enterprises, both of whom are citizens of Kentucky. However, § 1332 actually provides that "in any direct action against the insurer of a policy or contract of liability insurance, * * * to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business." This section refers to suits by an injured plaintiff directly against the insurer of the tort-feasor. *White* v. *United States Fidelity & Guaranty Company*, 356 F.2d 746 (1st Cir. 1966); *Carpenter* v. *Illinois Cent. Gulf R. Co.*, 524 F.Supp. 249 (D.La. 1981); *Irvin* v. *Allstate Ins. Co.*, 436 F.Supp. 575 (D.Okl. 1977). This defendant simply cannot understand how plaintiff could construe § 1332(c) as being applicable to

the situation presented here. This is not even an action against the insurer. This is an Intervening Complaint by the insurer of the injured plaintiff's employer to recover workers' compensation benefits paid and payable to the plaintiff. The insurer, Liberty Mutual, is a citizen of Massachusetts.

III

Finally, the plaintiff argues that § 1446(b) precludes a defendant from filing a notice until after its receipt of a copy of an amended pleading, motion, order or other paper showing that the case has become removable. At the same time, the plaintiff confirms the truth of the affidavit filed by Caterpillar's counsel that the plaintiff has in fact settled its claims with the defendant, Whayne Supply. The case law makes it clear that knowledge acquired by the removing defendant that plaintiff has effectively abandoned or settled its cause of action asserted against the non-diverse defendant is sufficient for removal purposes, and that non-receipt of a formal motion, order or other paper, which is totally under the control of the plaintiff and settling defendant, is not sufficient to defeat removal.

As stated in *Johnson* v. *Celotex Corp.*, 701 F.Supp. 553, 555 (D.Md. 1988):

> Where the plaintiff's voluntary conduct terminates plaintiff's action against the resident defendant, the circumstances creating removability are wholly beyond the control of the defendant * * *. Once the plaintiff's voluntary conduct by way of dismissal, settlement or otherwise indicates an intention to discontinue plaintiff's action against the resident defendant, a non-resident defendant's right to remove arises and is controlling so long as prompt action is taken.

See also *Bumgardner* v. *Combustion Engineering, Inc.*, 432 F.Supp. 1289 (D.S.C. 1977); *Heniford* v. *American*

Motors Sale Corp., 471 F.Supp. 328 (D.S.C. 1979); *Mancari* v. *AC & S Co., Inc.*, supra.

Now that a one-year restriction is imposed upon removal, these cases have even more validity since parties could settle and purposely delay preparation of the formal documents until after the expiration of one year. As set forth in its counsel's affidavit, Caterpillar was informed of the settlement on June 12, 1990. This defendant waited as long as it could and then, based upon its knowledge of the settlement with the non-diverse defendant, filed its notice of removal and affidavit on June 21, 1990, since the one year deadline on removal was imminent. It is now July 5, 1990, and this defendant has still not received any paper evidencing the acknowledged settlement other than the plaintiff's statement, in its objection to removal, that Caterpillar "is correct that the Plaintiff has settled its claims" with Whayne Supply.

It is respectfully submitted that the plaintiff's objection to removal should be overruled or, assuming the objection is treated as a motion to remand, such motion should be denied.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

MOTION TO REMAND

Comes the Plaintiff, James David Lewis, and would respectfully request an order from this Court remanding the above-styled action to the Lawrence Circuit Court in Lawrence County, Kentucky. As basis therefor, the Plaintiff states that this Court lacks subject matter jurisdiction over the instant claim and that this matter must therefore be remanded back to state court.

As the Defendant, Caterpillar, Inc., properly states, a partial settlement has been entered into by and between James David Lewis and Whayne Supply Company. However, James David Lewis still retains a claim against Whayne Supply Company to the extent of any subrogation found to exist herein on behalf of Liberty Mutual Insurance Group by virtue of benefits paid to the Plaintiff, James David Lewis, pursuant to the Kentucky workers' compensation policy which covered James David Lewis at the time of the accident involved herein. In addition, not even considering the claim of James David Lewis which still exists against Whayne Supply Company, Whayne Supply Company remains as a Defendant to this action while James David Lewis remains the Plaintiff to this action.

In the absence of complete diversity of citizenship between all Plaintiffs and all Defendants subject matter jurisdiction of an action does not exist by virtue of 28 U.S.C. Section 1332. *Trivett v. Bank of Delaware*, 421

F. Supp. 827 (D.C., Del., 1976). A presumption exists against diversity jurisdiction out of the regard for the rightful independence of state governments and said presumption requires federal courts to confine jurisdiction to the precise limits established by Congress. *Fleming v. Mack Trucks, Inc.*, 508 F. Supp. 917 (E.D., Pa., 1981). In the matter at bar, as there is not complete diversity of citizenship between all parties hereto as David Lewis is a citizen of the state of Kentucky and as Whayne Supply Company is a citizen of Kentucky, subject matter jurisdiction of this claim does not exist in this Court.

Since the Federal Rules of Civil Procedure do not create or withdraw jurisdiction and as complete diversity is required between all Plaintiffs and all Defendants a Plaintiff may not sue a non-diverse Defendant along with a diverse Defendant in the absence of an independent basis for federal jurisdiction and judicial economy does not authorize a District Court to exercise ancillary jurisdiction over such a claim. *Lamar Haddox Contractor, Inc. v. Potashnick*, 552 F. Supp. 11, 37 F.R. Service 2d 1024 (M.D. La., 1982). Accordingly, as there are non-diverse Plaintiffs and Defendants in this action subject matter jurisdiction does not exist.

While the Defendant, Caterpillar, Inc., may argue that Liberty Mutual is the true party in interest pursuing the claim herein this argument must fail as James David Lewis continues to pursue a claim against Whayne Supply Company with a regard to the benefits paid to him pursuant to the policy of workers' compensation herein. Under the rule that when an action is brought for the use of another, a court may recognize only the person in whose name the action is brought as a Plaintiff, the citizenship of a personal injury Plaintiff who commenced the action for his own use and use of a partially subrogated workmens compensation insurance carrier controls for the purpose of determining diversity jurisdiction under 28 U.S.C. Section 1332. The citizenship of the insurer need

not be considered since the insurer is not a party which needs to be joined under Rule 19. *Jefferson v. Ametek, Inc.*, 86 F.R.D. 425, 30 F.R. Service (D.C. Nd., 1980). While the practical needs of enabling federal courts to protect legal rights or to effectively resolve an entire, logically entwined lawsuit are the basis of the doctrine of ancillary jurisdiction, neither the convenience of the litigants nor considerations of judicial economy can suffice to justify the extension of the doctrine of ancillary jurisdiction to a cause of action against a third-party defendant who is a citizen of the same state as the Plaintiff in a diversity of citizenship case pursuant to 28 U.S.C. Section 1332 (a) (1). *Owen Equipment and Erection Company v. Kroger*, 437 U.S. 365, 57 L. Ed. 2d 274, 98 S. Ct. 2396 (1978). Thus, as the Plaintiff, James David Lewis, and the Defendant, Whayne Supply Company, are residents of the state of Kentucky diversity jurisdiction in this matter does not exist pursuant to 28 U.S.C. Section 1332 and this matter must therefore be remanded to the Lawrence Circuit Court in Lawrence County, Kentucky. Accordingly, for the reasons set out hereinabove and also for the reasons set out in the previous Objection to Removal filed herein, the Plaintiff would respectfully request that this matter be remanded to the state court.

Respectfully submitted,

/s/ Leonard Stayton
LEONARD STAYTON
Attorney at Law
P.O. Box 1386
Inez, Kentucky 41224

[Certificate of Service Omitted]

COMMONWEALTH OF KENTUCKY
LAWRENCE CIRCUIT COURT
DIVISION 1

No. 89-CI-091

JAMES DAVID LEWIS, PLAINTIFF

and

LIBERTY MUTUAL INSURANCE GROUP,
INTERVENING PLAINTIFF

v.

CATERPILLAR, INC. and WHAYNE SUPPLY CO.,
DEFENDANTS

AGREED ORDER DISMISSING CLAIMS AGAINST WHAYNE SUPPLY CO.

The court being sufficiently advised that plaintiff James David Lewis has compromised and settled a disputed claim against defendant Whayne Supply Company only,

IT IS HEREBY ORDERED that plaintiff's complaint against Whayne Supply Company only shall be and hereby is DISMISSED, with prejudice, with each party to pay its own costs.

There being no just cause for delay, this is a final and appealable order.

/s/ Stephen N. Frazier
Judge, Lawrence Circuit Court

Date August 2nd, 1990

SEEN AND AGREED TO BY:

/s/ James David Lewis
JAMES DAVID LEWIS
Plaintiff

/s/ Leonard J. Stayton
LEONARD J. STAYTON, ESQ.
P.O. Box 1386
Inez, Kentucky 4124
(606) 298-5117
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

RESPONSE OF CATERPILLAR INC. IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

MAY IT PLEASE THE COURT:

While the plaintiff does not concede the merits of Caterpillar's Memorandum in opposition to his Objection to Notice of Removal, he seems to take a new path in his more recent Motion to Remand, namely that the plaintiff himself still has a claim against Whayne Supply Company ("Whayne Supply").

The plaintiff cites cases in his Motion but they do not have specific application to the facts of this case. The plaintiff bases his Motion on his unsworn statement that he has settled with Whayne Supply but "still retains a claim against Whayne Supply Company to the extent of any subrogation found to exist herein on behalf of Liberty Mutual Insurance Group by virtue of benefits paid to the Plaintiff, James David Lewis, pursuant to the Kentucky workers' compensation policy which covered James David Lewis at the time of the accident involved herein"; and, at another point, the plaintiff states that he "continues to pursue a claim against Whayne Supply Company with a regard to the benefits paid to him pursuant to the policy of workers' compensation herein."

Caterpillar, speaking by counsel, does not understand what the plaintiff means. Has he settled with Whayne Supply or not? It seems that plaintiff is saying that he

has settled with Whayne Supply but that, if Liberty Mutual Insurance Group is entitled to some of the settlement proceeds, then he has reserved a claim against Whayne Supply for recovery of any money he has to pay to the workers' compensation carrier subrogee. This would be a most bizarre settlement to say the least. When is the last time that a defendant "settled" but remained in the case as a legitimate defendant, still subject to substantial additional exposure, still incurring the costs of defense and so on?

Frankly, it seems to this defendant that plaintiff recognizes that the only way he can possibly defeat diversity jurisdiction is to create some artifice whereby he can say that Whayne Supply remains as an original defendant.

The only sworn statement in this record is the affidavit of Caterpillar's undersigned counsel that he had been informed that Whayne Supply had settled with the plaintiff. Nowhere in the plaintiff's prior Objection did he state or contend that he had retained any claims against Whayne Supply. To the contrary, he specifically stated that Caterpillar "is correct that the Plaintiff has settled its claims with" Whayne Supply. The plaintiff offers nothing in support of his current Motion to Remand except his unsworn, contradictory statement that he has retained some sort of vague claim against Whayne Supply. The plaintiff has filed no settlement agreement, no "partial" release, no documents to support his contention of a retained action against Whayne Supply which would leave it in this case as a legitimate, real party defendant.

The plaintiff's Motion to Remand should be denied but, as stated in this defendant's earlier memorandum, if this Court has some doubt on the matter then some inquiry needs to be made as to the circumstances and conditions of plaintiff's settlement with Whayne Supply. If such an inquiry reveals that there is not true diversity, that is one thing; but Caterpillar does not want to be victimized by gamesmanship. This Court has the right to require an

evidentiary hearing or, in the alternative, this defendant requests an opportunity to develop the facts in this matter if the Court has any doubt. See *Stifel* v. *Hopkins,* 477 F.2d 1116, 1126 (6th Cir. 1973).

However, this defendant believes that it has made a prima facie showing of diversity jurisdiction. It is submitted that the plaintiff has failed to bear his burden to properly show otherwise. The Motion to Remand should be denied.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

SUPPLEMENTAL RESPONSE OF CATERPILLAR INC. IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

MAY IT PLEASE THE COURT:

The defendant, Caterpillar Inc., forwarded to the Court, on August 6, 1990, its Response to plaintiff's Motion to Remand. The defendant has today received in the mail the attached Agreed Order, dated August 2, 1990, whereby plaintiff's Complaint against Whayne Supply Company is dismissed, with prejudice. This is an unconditional Order which dismisses all claims of the plaintiff against Whayne Supply Company.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

[Filed Sep. 24, 1990]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

Civil Action No. 90-84

JAMES DAVID LEWIS, PLAINTIFF,

LIBERTY MUTUAL INSURANCE GROUP,
INTERVENING PLAINTIFF,

vs.

CATERPILLAR, INC. and WHAYNE SUPPLY CO.,
DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This matter is before the court upon plaintiff's motion to remand this action to state court.

In his complaint, plaintiff seeks damages for personal injuries. He alleges that he was operating a tractor manufactured by defendant Caterpillar and serviced by defendant Whayne Supply when a hose ruptured, spraying hydraulic fluid on the engine causing a fire. Plaintiff was burned and injured. Plaintiff did not name as a defendant his employer, Gene Wilson Enterprises. Liberty Mutual paid worker's compensation benefits to plaintiff and has intervened on a claim of indemnity.

The action was originally filed in Lawrence Circuit Court. Defendant Caterpillar removed the case to federal court on the basis of diversity jurisdiction when it learned, or had reason to believe, that plaintiff had settled his claim against defendant Whayne Supply. Plaintiff is a

Kentucky resident; intervening plaintiff is a Massachusettes corporation with its principal place of business in Massachusettes; defendant Caterpillar is a Delaware corporation with its principal place of business in Illinois; Whayne Supply is a Kentucky corporation with its principal place of business in Kentucky; Gene Wilson Enterprises is a Kentucky citizen.

In his motion to remand, plaintiff argues that the case is not ripe for removal as there is a lack of diversity among the parties. Plaintiff provides two bases for this argument, neither of which are meritorious.

Plaintiff first argues that there is a lack of diversity between himself and Liberty Mutual as Liberty Mutual takes on the citizenship of its insured, Gene Wilson Enterprises, a Kentucky citizen. In support of this argument plaintiff relies upon the following fragment from 28 U.S.C. § 1332(c)(1): in any action in which "the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen. . . ." Plaintiff's reliance is misplaced. A more complete reading of the statute follows:

> [A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen . . .

This case is not a "direct action against the insurer." Plaintiff's complaint contains no claim whatsoever against the insurer, Liberty Mutual. The insurer has intervened on a claim of indemnity and pursuant to the above quoted statute is a citizen only of its state of incorporation and the state of its principal place of business—Massachusettes.

Plaintiff next argues that there is a lack of diversity between himself and defendant Whayne Supply, both Kentucky citizens. Plaintiff points to the record which is devoid of and indication that he has settled his claim against Whayne Supply or that Whayne Supply has been dismissed. Plaintiff makes this argument while admitting in his motion that he has in fact settled his claim against Whayne Supply. His argument rests entirely upon the contents of the record. This argument fails for two reasons.

First, since the date the present motion was filed, a copy of an agreed order from the Lawrence Circuit Court dated August 2, 1990 has been filed in the record which states that plaintiff has settled all claims it may have had against Whayne Supply and that Whayne Supply is dismissed from this action. This order was entered approximately five weeks after the case was removed to federal court. The Lawrence Circuit Court had no authority to enter this order as it lost jurisdicton over the case when removal was effected. 28 U.S.C. § 1446(d). However, because it is styled as an agreed order, the court will construe it as a stipulation that plaintiff has settled all claims it may have had against Whayne Supply.

Second, the fact that in his motion plaintiff admits that he has settled all claims he may have had against Whayne Supply is dispositive. The presence or absence of formal documentation in the record is not controlling. If it were otherwise, plaintiff could successfully prevent removal to federal court by refusing to provide the state court with documentation of settlement until after the one year period provided by 28 U.S.C. § 1446 for removal of action based on diversity had elapsed.

Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) That plaintiff's motion to remand is DENIED;

(2) That, as to defendant Whayne Supply, plaintiff's complaint is DISMISSED with prejudice and plaintiff shall take nothing thereby.

This 24 day of September, 1990.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

AMENDED INTERVENING COMPLAINT AND CROSS-CLAIM

Comes Intervening Plaintiff, Liberty Mutual Insurance Group, by counsel, and for its Amended Intervening Complaint against Defendants, Caterpillar, Inc. and Whayne Supply Company, and each of them, states as follows:

JURISDICTION

1. Intervening Plaintiff, Liberty Mutual Insurance Group ("Liberty Mutual"), is an authorized insurer commissioned to transact business within the Commonwealth of Kentucky, and at all times pertinent hereto, provided Workers' Compensation insurance to plaintiff's employer, Gene Wilson Enterprises.

2. Defendant, Caterpillar, Inc. ("Caterpillar"), is a Delaware corporation, having its principal place of business at 100 N.E. Adams Street, Peoria, Illinois 61629.

3. Defendant, Whayne Supply Company ("Whayne Supply"), is a Kentucky corporation registered and qualified to do business within the Commonwealth of Kentucky and its principal place of business in Kentucky is 1400 South 43rd Street, Louisville, Kentucky.

4. Plaintiff, James David Lewis ("Lewis"), is a resident of Lawrence County, Kentucky and Intervening Plaintiff's Cross-Claim is brought against plaintiff pursuant to Fed.R.Civ.P. 13(8) solely for the purpose of

asserting a subrogation right against settlement proceeds received by plaintiff from Whayne Supply Company to the extent that said proceeds duplicate benefits which Intervening Plaintiff has previously paid Lewis directly or on his behalf.

5. At all times mentioned herein, Intervening Plaintiff, Liberty Mutual Insurance Group, provided Workers' Compensation coverage to plaintiff's employer, Gene Wilson Enterprises, Incorporated, and on July 9, 1988, the date plaintiff was injured, plaintiff and this Intervening Plaintiff had both elected to act and were acting under the provisions of the Workers' Compensation Act of the Commonwealth of Kentucky.

6. Plaintiff's cause of action was originally filed in state court in the Lawrence County Circuit Court on June 22, 1990. Within one year of the filing of said action, plaintiff entered into a settlement with defendant, Whayne Supply Company. Defendant, Caterpillar, Inc., then sought and obtained removal of this action to the United States District Court on June 21, 1990. Plaintiff's claims against defendant, Whayne Supply Company, were dismissed with prejudice by Agreed Order entered by the Lawrence Circuit Court on August 2, 1990.

COUNT I

(CLAIM FOR STRICT LIABILITY)

Plaintiff reiterates, adopts and incorporates by reference all previous allegations set forth herein and further alleges as follows:

7. On July 9, 1988, in Lawrence County Kentucky, plaintiff, James David Lewis, while acting within the course and scope of his employment with Gene Wilson Enterprises, Incorporated was operating a D8K dozer/tractor manufactured by Caterpillar, when a hydraulic hose thereon burst, spewing hydraulic fluid onto the tractor's exhaust manifold and exhaust system and plaintiff operator, causing personal injuries to plaintiff.

8. Defendant, Caterpillar, Inc., is among other things, a manufacturer and distributor of heavy equipment, including the D8K series tractor.

9. The subject Caterpillar D8K tractor was manufactured, sold and distributed by one or more of defendants, namely, Caterpillar, Inc. and Whayne Supply Company.

10. At the time and on the occasion set forth above, said D8K tractor was being used in its intended manner or in a manner reasonably foreseeable to defendants.

11. Defendant, Whayne Supply Company, is among other things, a distributor and retail seller of Caterpillar products, including the Caterpillar D8K tractor series, and also is engaged in maintaining, servicing and repairing Caterpillar products, including D8K's at request of customers.

12. At the time said D8K tractor was manufactured, marketed, designed, distributed and sold by defendants, said defendants were engaged in the business of marketing, manufacturing, designing and selling such products as and including the D8K tractor model which is the subject of this action. Defendants should be held strictly liable for plaintiff's injuries because the subject D8K tractor was manufactured, designed and sold in a defective condition unreasonably dangerous for the purpose for which it was intended.

13. Said D8K tractor was expected to and did reach the intended user and consumer without substantial change in the defective and unsafe condition in which it was designed, manufactured, distributed and sold.

14. Plaintiff's, James David Lewis, burns and injuries are the direct and proximate result of the design, manu-

facture, sale and distribution of the said defective and unreasonably dangerous D8K tractor.

COUNT II

(CLAIM FOR BREACH OF WARRANTY)

Intervening plaintiff, Liberty Mutual, reiterates, adopts, and incorporates by reference all previous allegations set forth herein and further alleges as follows:

15. Defendants, Caterpillar and Whayne Supply, as sellers, designers, manufacturers and distributors of the D8K series tractors including the subject D8K tractor which is the subject of this action, impliedly made and/or expressly warranted that said products were reasonably fit for the general uses and purposes for which they were intended; and that said product was free of defects in design, manufacture, assembly or construction which would cause an unreasonable risk of injury to persons reasonably expected to use or be near said product, including plaintiff, James David Lewis.

16. The burns and injuries sustained by plaintiff were a direct and proximate result of defendants' failure to comply with said implied and/or expressed warranties, and said D8K tractor was not reasonably fit for the general uses and purposes for which it was intended.

COUNT III

(CLAIM FOR NEGLIGENT MANUFACTURE/DESIGN)

Intervening plaintiff, Liberty Mutual, reiterates, adopts, and incorporates by reference all previous allegations set forth herein and further alleges as follows:

17. Defendants, Caterpillar and Whayne Supply, negligently manufactured, designed, assembled, marketed and sold said D8K tractor in such a manner that it created an

unreasonable risk of physical harm and injury to reasonably foreseeable and intended users of same, including plaintiff, and that said negligence included, but was not limited to, improper and dangerous design, construction, assembly, testing, inspection, failure to warn of the unreasonably dangerous condition of said products in their design or manufacture, and the continued design, manufacture, sale and distribution of said product after defendants knew, or should have known, through the exercise of reasonable care, that said product was defective, unsafe and dangerous and constituted an unreasonable risk of harm and injury to foreseeable and intended users of same, including plaintiff, James David Lewis.

18. The burns and injuries sustained by plaintiff, James David Lewis, and the damages resulting therefrom, are the direct and proximate result of the aforesaid negligence on part of defendants.

COUNT IV

(CLAIM BASED UPON ORDINARY OR COMMON LAW NEGLIGENCE IN MAINTAINING, SERVICING & REPAIRING)

Intervening plaintiff, Liberty Mutual, reiterates, adopts, and incorporates by reference each and every allegation previously set forth and further alleges as follows:

19. Defendant, Whayne Supply, besides distributing and selling Caterpillar equipment, is in the business of maintaining, servicing, repairing and inspecting Caterpillar products, including the D8K series Caterpillar tractor.

20. Defendant, Whayne Supply, sold the subject D8K tractor in its newly manufactured condition in September of 1981 following its manufacture by defendant, Caterpillar.

21. At the time Defendant, Whayne Supply, sold the subject D8K tractor, the subject tractor was sold new and the same was sold without substantial change or altera-

tion from the condition in which it was designed, manufactured, distributed and received by Whayne Supply from Caterpillar.

22. From and following the date said D8K tractor was sold by Whayne Supply in September, 1981, Whayne Supply, by and through its employees, agents and servants, maintained, serviced and made various repairs to the subject D8K tractor including the period during which it was owned and/or used by Gene A. Wilson Enterprises, Incorporated, plaintiff's employer, up through July 9, 1988, the date plaintiff was injured.

23. Defendant, Whayne Supply, by and through its employees, agents and servants, inspected, serviced, maintained and repaired the subject tractor at the request of Gene A. Wilson or his employees, agents or servants on various occasions during the weeks and months preceding July 9, 1988.

24. Defendant, Whayne Supply, was negligent, among other things, in maintaining, servicing, repairing and inspecting the subject D8K tractor, including but not limited to detecting and replacing a worn or frayed hydraulic lift hose, failing to detect dangerous conditions and/or defects with respect to said tractor and failing to warn Gene A. Wilson Enterprises, Incorporated or its employees, including James David Lewis, of unreasonably dangerous conditions relating to said tractor.

25. Defendant, Whayne Supply, in inspecting, maintaining, servicing and repairing said tractor, knew or should have known of dangerous defects and/or conditions relating to said tractor and failed to exercise ordinary and reasonable care in the performance of its maintaining, servicing, repairing and inspection of said tractor, and in advising the owner or users of said tractor as to dangerous conditions affecting the same.

26. The burns and injuries sustained by plaintiff, James David Lewis, and his damages resulting therefrom,

are the direct and proximate result of the aforesaid negligence on part of defendant, Whayne Supply Company.

COUNT V

(DAMAGES)

Intervening plaintiff, Liberty Mutual, reiterates, adopts and incorporates by reference each and every allegation previously set forth and further alleges as follows:

27. As a direct and proximate result of the negligence of defendants, Caterpillar, Inc. and Whayne Supply Company as previously alleged and their breaches of warranties and strict liability as previously specified, including the ordinary and common law negligence of Whayne Supply in maintaining, servicing, repairing and/or inspecting the subject tractor of its customer Gene Wilson Enterprises, Incorporated, plaintiff, James David Lewis, sustained serious and permanent injuries and burns to his arms, hands, neck, face, abdomen, legs, and the following damages, including permanent scarring and disfigurement, past and future pain and suffering, lost wages, past and future medical expenses, and impairment of his power to earn a living.

28. As a direct and proximate result of the negligence of defendants, Caterpillar, Inc. and Whayne Supply Company, as previously alleged and their breaches of warranties and strict liability as previously specified, including the ordinary and common law negligence of Whayne Supply in maintaining, servicing, repairing and/or inspecting the subject tractor of its customer, all of which caused plaintiff's injuries and damages as previously stated, this intervening plaintiff was required to and has paid through August 15, 1991, to or on behalf of James David Lewis, income benefits in the amount of $37,-349.90 as temporary total disability benefits and medical benefits in the amount of $166,292.22, and is continuing to pay all Workers' Compensation benefits as required by

the Workers' Compensation Act of the Commonwealth of Kentucky incurred by plaintiff as a result of injuries he sustained on July 9, 1988.

29. In accordance with the provisions of KRS 342.700 and all other applicable law, this intervening plaintiff is entitled to recover from defendants, Caterpillar, Inc. and Whayne Supply Company, and each of them, all Workers' Compensation benefits, including medical expenses, paid or payable by this Intervening Plaintiff to or on behalf of plaintiff, James David Lewis.

30. In the alternative, intervening plaintiff is entitled to judgment against defendants, Caterpillar, Inc. and Whayne Supply Company, on the basis of common law and statutory indemnity, for any and all sums which it has been, and in the future may be, compelled or required by law to pay to or on behalf of plaintiff, James David Lewis, as a result of injuries sustained by him on July 9, 1988.

CROSS-CLAIM

(CROSS-CLAIM FOR STATUTORY SUBROGATION AGAINST PLAINTIFF, JAMES DAVID LEWIS)

For its Cross-Claim against plaintiff, James David Lewis, Intervening Plaintiff, Liberty Mutual, alleges as follows:

Intervening Plaintiff, Liberty Mutual, is the worker's compensation carrier for plaintiff's employer, Gene Wilson Enterprises, Incorporated, for whom plaintiff was working on July 9, 1988, the day plaintiff was injured.

2. Both plaintiff and his employer, Gene Wilson Enterprises, Incorporated, had elected to act and were acting under the provisions of the Worker's Compensation Act on July 9, 1988.

3. As a result of plaintiff's injuries sustained while in the employ of Gene Wilson Enterprises, Incorporated,

Intervening Plaintiff's insured, Intervening Plaintiff has paid plaintiff through August 15, 1991, in accordance with the provisions of the Worker's Compensation Act, the sum of $37,349.90 as income benefits and $166,-292.22 for medical benefits.

4. Pursuant to KRS 342.700, Intervening Plaintiff is granted statutory subrogation rights not to exceed the indemnity paid and payable to the injured employee, namely, plaintiff, James David Lewis.

5. Plaintiff and defendant, Whayne Supply Company, have entered into a settlement agreement resulting in release by plaintiff of all claims he has against Whayne Supply Company. Intervening Plaintiff was not consulted by either plaintiff or Whayne Supply Company regarding said settlement nor was it a participant in such settlement. As a result of said settlement, plaintiff received substantial monetary consideration compensating him for damages he sustained by virtue of the fire and resulting injuries that occurred on July 9, 1988.

6. Intervening Plaintiff is entitled to be reimbursed and to recover judgment against plaintiff for those elements of damages which he has been compensated for by virtue of his settlement with Whayne Supply to the extent that plaintiff's settlement recovery duplicates or represents amounts previously paid by Intervening Plaintiff to plaintiff for lost wages and medical expenses.

7. Intervening Plaintiff is entitled to have a fair and impartial determination as to what portion of plaintiff's settlement with Whayne Supply Company represents or duplicates worker's compensation benefits which Intervening Plaintiff has previously paid to or on behalf of plaintiff, and to the extent that there is duplication, Intervening Plaintiff is entitled to a judgment in the amount so determined.

WHEREFORE, Intervening Plaintiff, Liberty Mutual Insurance Group, requests on its Complaint and Amended

Complaint against Caterpillar, Inc. and Whayne Supply Company, that it be awarded judgment granting indemnity, common law and/or statutory, from defendants, Caterpillar, Inc. and Whayne Supply Company, jointly and severally, for all sums paid or payable as workers' compensation benefits to or on behalf of plaintiff, James David Lewis, together with interest on all sums paid and to be paid; and requests on its Cross-Claim against plaintiff, James David Lewis, judgment reimbursing Intervening Plaintiff from the settlement proceeds received from Whayne Supply Company for any duplication of worker's compensation benefits which plaintiff has received and for which Intervening Plaintiff has previously paid to or on behalf of plaintiff; for its costs herein, expended; and for all other relief to which it may be entitled, including a jury determination of all issues regarding liability and damages, including what damages the settlement between plaintiff and Whayne Supply represent.

OGDEN, STURGILL & WELCH

By: /s/ Phillip M. Moloney
PHILLIP M. MOLONEY
155 East Main Street
Lexington, Kentucky 40507
Telephone: (606) 255-8581
Attorneys for Intervening
Plaintiff and Third-Party
Defendant

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

[Caption Omitted]

ORDER

This matter is before the Court on a motion by intervening plaintiff to amend its intervening complaint. Specifically, intervening plaintiff seeks to assert a cross-claim against plaintiff and to assert a new claim of common law negligence against Whayne Supply, defendant on the intervening complaint.

At the July 26, 1991 pre-trial conference on this matter, parties were given until August 26, 1991 to file amendments to their complaints. Since intervening plaintiff's motion to amend was filed on August 26, 1991, it was timely and will be allowed.

Accordingly,

IT IS THEREFORE ORDERED:

(1) That intervening plaintiff's motion to amend its intervening complaint is GRANTED;

(2) That the tendered amended intervening complaint and cross-claim will be deemed FILED as of the date of entry of this order.

This 3 day of Dec. 1991.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

WHAYNE SUPPLY COMPANY'S ANSWER TO LIBERTY MUTUAL INSURANCE GROUP'S AMENDED INTERVENING COMPLAINT

Defendant, Whayne Supply Company, for its answer to Liberty Mutual Insurance Group's amended intervening complaint states as follows:

FIRST DEFENSE

1. Whayne Supply Company adopts and incorporates by reference each and every defense set forth in its original answer to Liberty Mutual Insurance Group's amended intervening complaint.

2. Whayne Supply is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraphs 1, 2, 5, 7 and 10 of the amended intervening complaint and, therefore, denies these allegations.

3. The allegations in paragraph 4 is directed at a party other than Whayne Supply, and Whayne Supply Company lacks sufficient knowledge to form a belief as to their truth or falsity and, therefore, denies these allegations.

4. Whayne Supply Company admits the allegations in paragraphs 3, 6, 8, 11, 20 and 21.

5. Whayne Supply Company admits paragraph 9 insofar as it alleges that at one time, Whayne Supply Company sold and distributed a Caterpillar D8K tractor alleged by Liberty Mutual Insurance Group to have been involved in the incident which is the subject matter of this lawsuit.

6. In response to paragraph 12 of the amended intervening complaint, Whayne Supply Company is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations directed to defendant, Caterpillar, Inc. and, therefore denies these allegations. However, Whayne Supply Company admits paragraph 12 insofar as it alleges that at the time the D8K tractor alleged to be involved in the incident which is the subject matter of this lawsuit was sold by Whayne Supply Company, Whayne Supply Company was engaged in the business of selling such products, but the remaining allegations in paragraph 12 are denied.

7. Whayne Supply Company denies the allegations in paragraphs 13, 14, 16, 17, 18, 24, 25, 26, 27, 28, 29 and 30.

8. In response to paragraph 15 of the amended intervening complaint, Whayne Supply Company is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations directed to defendant, Caterpillar, Inc., but the allegations directed to Whayne Supply Company in paragraph 15 are denied.

9. Whayne Supply Company admits paragraph 19 insofar as it alleges that Whayne Supply Company is in the business of distributing, selling, maintaining, servicing and repairing Caterpillar products, including the D8K series Caterpillar tractor, but the remaining allegations in paragraph 19 are denied.

10. Whayne Supply Company admits the allegations in paragraph 22 insofar as it alleges that Whayne Supply Company serviced and made repairs to the D8K tractor alleged by the intervening plaintiff to be involved in the

incident which is the subject matter of this lawsuit, including the period in which it was owned or used by Gene A. Wilson Enterprises, Inc., up through July 9, 1988, but the remaining allegations are denied.

11. Whayne Supply Company admits paragraph 23 insofar as it alleges that Whayne Supply Company served and repaired the tractor alleged by the intervening plaintiff to have been involved in the incident which is the subject matter of this lawsuit at the request of Gene A. Wilson or his employees, agents or servants on occasions preceding July 9, 1988, but the remaining allegations in paragraph 23 are denied.

12. Whayne Supply Company denies each and every allegation contained in the intervening plaintiff's amended complaint not specifically admitted.

SECOND DEFENSE

13. The complaint fails to state a claim upon which relief can be granted against Whayne Supply Company.

THIRD DEFENSE

14. The plaintiff, James David Lewis, failed to exercise ordinary care for his own safety, and his negligence was the sole or substantial factor in causing his alleged injuries and damages.

FOURTH DEFENSE

15. The injuries and damages complained of by the plaintiff, James David Lewis, were caused by independent, intervening or superseding acts of negligence of third parties over whom Whayne Supply Company has no control and for whom Whayne Supply Company has no legal responsibility.

FIFTH DEFENSE

16. The intervening plaintiff's claims are barred in whole by the Kentucky Products Liability Act.

SIXTH DEFENSE

17. Whayne Supply Company has incurred no legal liability to pay damages to the plaintiff and, therefore, Whayne Supply Company has no legal liability to the intervening plaintiff, pursuant to KRS 342.700 or otherwise.

WHEREFORE, Whayne Supply Company demands:

(a) That the amended intervening complaint against it be dismissed with prejudice;

(b) Its costs incurred;

(c) All other relief to which it may appear entitled.

/s/ Catherine C. Young
JOHN L. TATE
CATHERINE CRAWFORD YOUNG
STITES & HARBISON
600 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 587-3400
Counsel for Defendant,
Whayne Supply Company

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

ANSWER OF DEFENDANT, CATERPILLAR INC., TO AMENDED INTERVENING COMPLAINT

Comes the defendant, Caterpillar Inc., and, for Answer to the Amended Intervening Complaint of the intervening plaintiff, Liberty Mutual Insurance Group, states and alleges as follows:

FIRST DEFENSE

1. This answering defendant, partly upon information and belief, admits the allegations contained in numerical paragraphs 1, 2, 3, 5, 8, 9, 11, 19, 21 and 23 of the Amended Intervening Complaint.

2. This answering defendant, partly upon information and belief, admits the allegations contained in numerical paragraph 4 of the Amended Intervening Complaint except the applicability of Fed.R.Civ.P. 13(8) and admits the allegations contained in paragraph 6 except it denies that the plaintiff's cause of action was originally filed on June 22, 1990, i.e., the action having been filed on June 22, 1989.

3. This answering defendant admits so much of the allegations contained in numerical paragraph 7 of the Amended Intervening Complaint except it denies the sufficiency of the description of the occurrence.

4. This answering defendant admits the allegations contained in numerical paragraph 8, 9 and in the first sentence of numerical paragraph 12 of the Amended Intervening Complaint to the extent that it admits that it is a manufacturer and seller of heavy equipment, that it was a manufacturer and seller of the D8K series tractor and that it manufactured and originally sold the subject tractor which was subsequently sold by Whayne Supply Company.

5. This answering defendant admits the allegations contained in numerical paragraph 15 of the Amended Intervening Complaint to the extent that it admits that it designed and manufactured the subject D8K tractor and that the tractor as designed, manufactured, assembled, marketed and expressly warranted by this answering defendant was reasonably fit for the general uses and purposes for which the tractor was intended.

6. This answering defendant, partly upon information and belief, admits the allegations contained in numerical paragraphs 20 and 22 of the Amended Intervening Complaint, except it believes the sale by Whayne Supply Company was on or about August 31, 1981, and that Whayne Supply's last service work on the subject tractor prior to the occurrence and injury was on July 5, 1988.

7. This answering defendant denies the remaining allegations contained in the Amended Intervening Complaint which pertain to it and which are not expressly admitted herein and, by way of general response to the allegations contained in the Intervening Complaint, affirmatively states that the D8K track-type tractor, when manufactured and sold, was merchantable and fit for the use for which it was manufactured, intended and supplied, and the defendant specifically denies any and all allegations contained in the Amended Intervening Complaint which state or infer that the subject machine, at the time of original manufacture and delivery was defective, unfit or unsafe for the purposes for which the product was intended to be used, and it specifically denies any breach of warranties, negligence or other liability on its part.

SECOND DEFENSE

The plaintiff, James David Lewis, was guilty of negligence and carelessness which was a substantial cause of the occurrence and alleged damages alleged in the Complaint and Amended Intervening Complaint herein, and the negligence, fault and failure on his part to exercise ordinary care in the circumstances constitutes a complete bar to the plaintiff's claims for damages herein pursuant to KRS 411.320(3), and reference is made to the Eighth Defense herein.

THIRD DEFENSE

For further defense herein, this answering defendant states and alleges that the design, methods of manufacture and testing of the subject tractor conformed to the generally recognized and prevailing standards or state-of-the-art in existence at the time of design and manufacture, and this answering defendant pleads and relies upon the presumption that the product was not defective, as provided in KRS 411.310(2), and upon other applicable provisions of the Product Liability Act of Kentucky, and reference is made to the Eighth Defense herein.

FOURTH DEFENSE

For further defense herein, this answering defendant states and alleges that the injuries and damages alleged in the Complaint and Amended Intervening Complaint would not have occurred if the subject tractor had been used in its original, unaltered and unmodified condition, and this answering defendant pleads and relies upon the provisions of the Product Liability Act of Kentucky, including KRS 411.320, and reference is made to the Eighth Defense herein.

FIFTH DEFENSE

For further defense herein, this answering defendant states and alleges that the injuries and damages alleged in the Complaint and Amended Intervening Complaint occurred more than five (5) years after the date of the sale of the subject tractor to the first consumer and, accordingly, this answering defendant pleads and relies upon the presumption that the product was not defective, as provided in KRS 411.310(1), and reference is made to the Eighth Defense herein.

SIXTH DEFENSE

For further defense herein, this answering defendant states and alleges that in the event it is determined that the plaintiff was not at fault herein and that this answering defendant was to some extent at fault herein, which fault on its part is specifically denied, its liability herein is limited in accordance with the percentage of fault allocated to it.

SEVENTH DEFENSE

For further defense herein, this answering defendant states and alleges that the claims predicated upon this answering defendant's alleged breach of warranties are barred by the limitations provisions of KRS 355.2-725 and by the provisions of KRS 355.2-316(2), KRS 355.2-318, KRS 355.2-607(3) and other applicable provisions of the Uniform Commercial Code and by other applicable law, and reference is made to the Eighth Defense herein.

EIGHTH DEFENSE

For further defense herein, this answering defendant states and alleges that for the reasons asserted in its Answer to the plaintiff's Complaint herein, all of which are hereby adopted and reaffirmed, and for the reasons asserted in this Answer to the Amended Intervening Complaint, this answering defendant has incurred no legal liability to pay damages to the plaintiff and, therefore, this answering defendant has no legal liability to the intervening plaintiff pursuant to KRS 342.700 or otherwise.

WHEREFORE, the defendant, Caterpillar Inc., prays that the Amended Intervening Complaint be dismissed as

against it; prays for its costs herein expended and for all further and proper relief to which it may appear entitled.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

ANSWER OF PLAINTIFF, JAMES DAVID LEWIS, TO CROSS CLAIM

Comes the Plaintiff, James David Lewis, and for his answer to the cross claim as filed by the Intervening Plaintiff, Liberty Mutual, would state as follows:

1. The Plaintiff, James David Lewis, would affirm the allegations contained in numbers 1, 2, 3, and 4.

2. The Plaintiff would state that he did enter into an agreement with Whayne Supply Company whereby a settlement was reached. However, this settlement did not settle all claims against Whayne Supply Company as the terms of the settlement reserved the subrogation claim which Liberty Mutual would have against Whayne Supply Company and provided that Whayne Supply Company would be responsible for said subrogation rights.

3. The Plaintiff would deny the allegations contained in numbers 6 and 7 of the cross claim and would state that the intervening plaintiff's remedy would lie against Whayne Supply Company pursuant to the applicable law and pursuant to the settlement agreement reached between the Plaintiff and Whayne Supply Company.

WHEREFORE, the Plaintiff, James David Lewis, would respectfully request that the cross claim which has been filed herein be dismissed and held for naught and that the Plaintiff recover all of his costs incurred herein including, but not limited to, a reasonable attorney's fee.

Respectfully submitted,

/s/ Leonard Stayton
LEONARD STAYTON
Attorney at Law
P.O. Box 1386
Inez, Kentucky 41224

[Certificate of Service Omitted]

[Filed Jun 8, 1993]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

AGREED ORDER DISMISSING CLAIMS AGAINST WHAYNE SUPPLY COMPANY

The court being sufficiently advised that the intervening plaintiff, Liberty Mutual Insurance Group, has compromised and settled a disputed claim against defendant Whayne Supply Company only,

IT IS HEREBY ORDERED that plaintiffs' intervening complaint against Whayne Supply Company shall be and hereby is DISMISSED, with prejudice, with each party to pay its own costs.

There being no just cause for delay, this is a final and appealable order.

/s/ Henry R. Wilhoit, Jr.
Judge
United States District Court
Eastern District of Kentucky
Ashland Division

Date: June 8, 1993

HAVE SEEN AND AGREED:

/s/ John L. Tate
JOHN L. TATE
CATHARINE CRAWFORD YOUNG
STITES & HARBISON
600 West Main Street
Louisville, Kentucky 40202
(502) 587-3400

Counsel for Defendant,
Whayne Supply Company

/s/ Phillip M. Moloney
PHILLIP M. MOLONEY
STURGILL, TURNER & TRUITT
155 East Main Street
Lexington, Kentucky 40507
(606) 255-8581

Counsel for Liberty Mutual Insurance Group

(cDky-112)

United States District Court
EASTERN DISTRICT OF KENTUCKY

ASHLAND

CIVIL MINUTES — TRIAL

Case No. 90-84 At Ashland, Kentucky Date November 22, 1993

Style JAMES DAVID LEWIS, ET AL. VS. CATERPILLAR, INC., ET AL.

DOCKET ENTRY The motion of the parties to withdraw all chart exhibits is GRANTED and all chart exhibits shall be returned to the submitting party.

PRESENT:

HON. HENRY R. WILHOIT, JR., JUDGE

Christina M. Venoy — Deputy Clerk

Peggy W. Weber — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

LEONARD STAYTON
PHILLIP MOLONEY FOR INT. PLTF.

ATTORNEYS PRESENT FOR DEFENDANTS:

WILLIAM MAREADY
LESLIE MORRIS
PHILLIP MOLONEY FOR 3rd PTY DEFT.

_____Case called and continued to_____for trial.

_____COURT TRIAL __X__JURY TRIAL The Jury impaneled and sworn is as follows:

(1) 376 Vanessa L. Lowe (3) 429 Joseph Southers (5) 361 Mary A. Springer

(2) 437 Beverly J. Litteral (4) 324 Larry E. Wright (6) 306 Pamela J. Reynolds

~~(1st Alternate)~~ (7) 357 David J. Gollihue (2nd Alternate) _____

_____Introduction of evidence for____plaintiff____defendant____begun, ____resumed, not and concluded;

_____Rebuttal evidence; ____Surrebuttal evidence ____Continued to _____further trial.

X Jury retires to deliberate at 11:35 a.m.; Jury returns at 3:55p.m.

_____JUDGMENT BY COURT __X__JURY VERDICT. SEE VERDICT OR ANSWERS TO INTERROGATORIES

X Jury polled.

_____Proposed Findings of Fact, Conclusions of Law & Judgment to be prepared by_____plaintiff; _____defendant.

_____Submitted. _____BRIEFS to be filed_____ Plaintiff _____ Defendant _____ Reply

within ____ days following the filing of transcript by Official Court Reporter.

Copies:

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Initials of Deputy Clerk_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

[Caption Omitted]

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict by answers to Special Interrogatories,

IT IS ORDERED AND ADJUDGED

That the plaintiff and intervening plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Caterpillar, Inc., recover of the plaintiffs, its costs of this action.

Date November 23, 1993

Leslie G. Whitmer
Clerk

/s/ Christina M. Venoy
(By) Deputy Clerk

[Filed Oct. 11, 1995]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 94-5253

JAMES DAVID LEWIS, PLAINTIFF-APPELLANT,
LIBERTY MUTUAL INSURANCE GROUP,
INTERVENING PLAINTIFF,

v.

CATERPILLAR, INC.,
DEFENDANT and THIRD-PARTY PLAINTIFF-APPELLEE,

GENE A. WILSON ENTERPRISES, INC.,
THIRD-PARTY DEFENDANT,

WHAYNE SUPPLY COMPANY, DEFENDANT.

On Appeal from the United States District Court
for the Eastern District of Kentucky

BEFORE: WELLFORD, MILBURN, and SUHRHEINRICH, Circuit Judges.

PER CURIAM. Plaintiff James David Lewis appeals the jury verdict for defendant Caterpillar, Inc. in this diversity action for personal injury. On appeal, the issues are (1) whether the district court erred in denying plaintiff's motion to remand the case to state court, (2) whether the district court erred in limiting the scope of discovery of prior similar accidents, (3) whether this

court should enter sanctions against defendant for defendant's alleged improper response to discovery requests, (4) whether the district court erred in excluding certain exhibits, (5) whether the district court erred in excluding certain witnesses from testifying at trial, and (6) whether the district court erred by failing to instruct the jury on defendant's alleged failure to warn. For the reasons that follow, we vacate and remand.

I.

A.

On July 9, 1988, plaintiff James David Lewis, a resident of Louisa, Kentucky, was injured while he was operating a Caterpillar D8K bulldozer, which was manufactured by defendant Caterpillar, Inc., a Delaware corporation with its principal place of business in Illinois. While plaintiff was operating the bulldozer near Louisa, Kentucky, a hydraulic hose connected to the cylinder that raises and lowers the bulldozer blade ruptured causing hydraulic fluid to spray over the engine of the bulldozer and also on plaintiff. The fluid ignited, and plaintiff received burns over approximately 48% of his body.

The evidence at trial showed that the steel hydraulic hose ruptured because it was positioned against the hood of the bulldozer causing the two steel surfaces to grind against each other. Caterpillar presented evidence that its XT3 hydraulic hoses are made with four layers of steel wrappings that give them a hardness greater than that of ball-bearing steel. Caterpillar argued at trial that several conditions existing in the D8K at the time of the accident, but not existing at the time of the D8K's manufacture, caused the hydraulic hose to fail. Caterpillar presented evidence that at same point prior to the accident the D8K had been hit with a force of 15,000 to 30,000 pounds. This force sheared off a bolt that stabilized the tube assembly to which the hydraulic hoses were connected and bent the tube assembly about 20 degrees.

In addition, Caterpillar presented evidence that the hoses in the D8K at the time of the accident were manufactured by someone other than Caterpillar and were an inch to an inch and a half too long. Because the hoses were too long, they made a larger loop thereby coming closer to the hood of the D8K. Further, evidence showed that the hoses, which had different types of connections on each end, had been installed backwards also causing the hoses to be positioned closer to the hood. Although Caterpillar's maintenance manual includes a visual depiction of how the hose is to be installed, the parties disputed whether this adequately explained the proper installation of the hoses.

On the other hand, plaintiff argued at trial that, notwithstanding these conditions, the D8K had a design defect that caused the accident in this case. Plaintiff's expert, Wayne Coloney, testified that the accident could have been avoided if Caterpillar had used a deflecting shield that would have prevented hydraulic fluid from spraying on the operator of a D8K should a hydraulic hose rupture. Plaintiff also argued that Caterpillar was aware of the propensity for and the danger of hydraulic hoses rupturing and causing fires on the D8K.

B.

Plaintiff initiated this action on June 22, 1989 in the Lawrence [Kentucky] Circuit Court. In his complaint, plaintiff alleged strict liability in tort, negligence, and breach of warranty and named as defendants Caterpillar, Inc., the manufacturer of the bulldozer, and Whayne Supply Co., a Kentucky corporation with its principal place of business in Kentucky, which serviced the bulldozer prior to the incident at issue in this case. After plaintiff filed his complaint, Liberty Mutual Insurance Company ("Liberty Mutual"), a Massachusetts corporation with its principal place of business in Massachusetts, intervened as a plaintiff in this case. Liberty Mutual brought claims against both Caterpillar and Whayne Supply Co.

for subrogation of worker's compensation benefits paid to Lewis on behalf of his employer and third-party defendant, Gene A. Wilson. While the case was pending in the state court, plaintiff entered into a settlement agreement with Whayne Supply Co. However, because Liberty Mutual was not included in the settlement agreement, it continued to assert its claims against Whayne Supply Co. Liberty Mutual also filed a cross-claim against Lewis for reimbursement for any worker's compensation paid him by Whayne Supply Co. with regard to Liberty Mutual's subrogation interest.

After learning of the settlement between plaintiff and Whayne Supply Co., Caterpillar removed the case to federal court, over Lewis' objection, on June 21, 1990. Plaintiff and Whayne Supply Co., however, did not file anything notifying the Lawrence Circuit Court of the settlement until August 2, 1990. Lewis subsequently filed a motion to remand the case to state court on the ground that because defendant Whayne Supply Co., a Kentucky corporation, remained a defendant in the case by virtue of Liberty Mutual's subrogation claim, there was not complete diversity at the time of the removal from the state court. This district court denied this motion on September 24, 1990.

Whayne Supply Co. and Liberty Mutual subsequently settled their claims on June 8, 1993. A jury trial commenced on November 15, 1993. The jury returned a verdict in favor of defendant Caterpillar, Inc. on November 22, 1993. Plaintiff then filed a motion for a new trial, but the district court denied this motion on February 1, 1994. This timely appeal followed.

II.

A.

Plaintiff argues that the district court erred in denying his motion to remand the case to state court. Specifically, plaintiff asserts that the district court lacked subject mat-

ter jurisdiction because complete diversity between the parties did not exist at the time of removal. Plaintiff bases this assertion on the fact that, at the time of removal, plaintiff, a Kentucky resident, continued to be a party to the case, and defendant Whayne Supply Co., a Kentucky corporation, remained a defendant in the case by virtue of intervening plaintiff Liberty Mutual's subrogation claim against it. Removal is a question of federal subject matter jurisdiction that we review de novo. *Certain Interested Underwriters at Lloyd's London, England v. Layne*, 26 F.3d 39, 41 (6th Cir. 1994); *Van Camp v. AT & T Information Sys.*, 963 F.2d 119, 121 (6th Cir.), *cert. denied*, 113 S. Ct. 365 (1992). When reviewing the denial of a motion to remand a case to state court, "we look to determine ' "whether the case was properly removed to federal court in the first place." ' " *Van Camp*, 963 F.2d at 121 (quoting *Fakouri v. Pizza Hut of America, Inc.*, 824 F.2d 470, 472 (6th Cir. 1987) (quoting *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir. 1985)). *When an action is removed based on diversity, we must determine whether complete diversity exists at the time of removal. Higgins v. E.I. Dupont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988). Under 28 U.S.C. § 1332(a)(2), subject matter jurisdiction based on diversity of citizenship vests federal district courts with jurisdiction in cases of sufficient value between "citizens of a State and citizens or subjects of a foreign state." *Id.* A natural person's citizenship is determined by his domicile, while a corporation has the citizenship of the state of its incorporation and its principal place of business. *Safeco Ins. Co. v. City of White House*, 36 F.3d 540, 544 (6th Cir. 1994). "Diversity jurisdiction attaches only when all parties on one side of the litigation are of a different citizenship from all parties on the other side of the litigation." *SHR Limited Partnership v. Braun*, 888 F.2d 455, 456 (6th Cir. 1989). *Accord Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, (1806); *Safeco Ins. Co.*, 36 F.3d at 545; and *Certain Interested Underwriters*, 26 F.3d at 42. In this regard, "[a] plaintiff seeking to bring a case into federal court carries the burden of establishing diversity jurisdiction." *Certain Interested Underwriters*, 26 F.3d at 41.

Caterpillar asserts that diversity jurisdiction was created when plaintiff settled with Whayne Supply Co. Thus, "[t]he question is simply whether, at the time of removal, the plaintiffs effectively 'ha[d] taken the resident defendant out of the case, so as to leave a controversy wholly between the plaintiff[s] and the nonresident defendant.' " *Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 692 (5th Cir. 1995) (quoting *American Car & Foundry Co. v. Kettelhake*, 236 U.S. 311, 316 (1915)). *See Mancari v. AC & S Co.*, 683 F. Supp. 91, 93 (D. Del. 1988) (applying the voluntary act of the plaintiff doctrine and holding that a case may become removable after being initiated in state court where non-diverse defendant was dismissed from case leaving a new state of complete diversity between the parties). In this case, as plaintiff notes, Liberty Mutual continued to assert its claim against defendant Whayne Supply Co. after plaintiff settled with Whayne Supply Co.[1] Thus, at the time Caterpillar removed the case to federal court, plaintiff, a resident of Kentucky, remained a party to the case by virtue of his claim against defendant Caterpillar. Defendant Whayne Supply Co., a Kentucky corporation, was also a party to the case in light of intervening plaintiff Liberty Mutual's

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[1] Plaintiff claims that his settlement with Whayne Supply Co. was only partial and that he reserved a claim against Whayne Supply Co. for reimbursement for worker's compensation paid to him by Liberty Mutual. Lewis asserts that Liberty Mutual's subrogation claim against defendant Whayne Supply Co. was filed on behalf of Liberty Mutual and himself. We need not resolve this issue in light of our conclusion that because plaintiff and defendant Whayne Supply Co. remained parties to the case at the time of removal, diversity was not complete.

subrogation claim against it.[2] Thus, complete diversity did not exist at the time that the case was removed to federal court. Unfortunately, we must remand a case that has proceeded through judgment in the district court. We hold that the district court erred in denying plaintiff's motion to remand this case to the state court for lack of subject matter jurisdiction because complete diversity did not exist at the time this case was removed from the state court.[3]

III.

For the reasons stated, the judgment of the district court is VACATED and this case is REMANDED to the district court.

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[2] Although Caterpillar argues on appeal that parties named in an intervening complaint are not included in diversity determinations, Caterpillar cites no authority for this proposition. This argument is not persuasive. This court has held under other circumstances that an intervening party may destroy diversity jurisdiction. *Cf. Jenkins v. Reneau*, 697 F.2d 160, 162 (6th Cir. 1983) (holding that an intervening petition by a non-diverse indispensable party destroys diversity jurisdiction).

[3] Because we hold that the district court lacked jurisdiction over this case, we do not reach plaintiff's other arguments on appeal.

SUPREME COURT OF THE UNITED STATES

No. 95-1263

CATERPILLAR INC.,
Petitioner,

v.

JAMES DAVID LEWIS

April 15, 1996

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted limited to Questions 1 and 2 presented by the petition.

(4)

No. 95-1263

In the Supreme Court of the United States

OCTOBER TERM, 1995

CATERPILLAR INC.,
Petitioner,

v.

JAMES DAVID LEWIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF FOR THE PETITIONER

JAMES B. BUDA
Caterpillar Inc.
100 N.E. Adams St.
Peoria, IL 61629-7310

WILLIAM F. MAREADY
Robinson Maready Lawing & Comerford, L.L.P.
380 Knollwood St.
Suite 300
Winston-Salem, NC 27103

KENNETH S. GELLER*
MICHAEL R. FEAGLEY
JOHN E. MUENCH
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

LESLIE W. MORRIS II
Stoll, Keenon & Park, LLP
201 E. Main St.
Suite 1000
Lexington, KY 40507

* *Counsel of Record*

30 pp

QUESTION PRESENTED

This case was removed from state to federal court at a time when there was not complete diversity of citizenship among the parties. The district court nevertheless declined to remand the case to state court. The absence of diversity was cured prior to trial and judgment in federal court. The question presented is:

Whether, when diversity of citizenship was not complete at the time of removal, but complete diversity existed during trial and at the time of final judgment, the case must be remanded for a new trial in state court.

RULE 29.6 STATEMENT

Petitioner Caterpillar Inc. has no parent companies. Its non-wholly owned subsidiaries are Cyclean, Inc.; Advanced Filtration Systems, Inc.; Health Plan of Central Illinois, Inc.; Caterpillar Commercial N.V.; AO Nevarnash; and UNOC Equipment and Supply, LLC.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 84-90) is not reported. The opinion of the district court denying the motion to remand (J.A. 53-56) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1995, and a petition for rehearing was denied on November 21, 1995 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on February 8, 1996, and was granted on April 15, 1996 (J.A. 91). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441(a) provides in relevant part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1447(c) provides in relevant part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

STATEMENT

1. The federal removal statutes permit a defendant to remove from state to federal court "any civil action brought

in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). This rule makes the availability of removal turn on whether the case could have been brought in federal court as an initial matter, although a case may be removed on grounds of diversity of citizenship "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). A notice of removal must be filed within 30 days of the defendant's receipt of the complaint. If, however, "the case stated by the initial pleading is not removable," a notice of removal may be filed within 30 days after the defendant learns that the case has become removable. 28 U.S.C. § 1446(b).

Once a case has been removed to federal court, "[a] motion to remand the case [to state court] on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Orders remanding cases to state court are expressly made unreviewable "by appeal or otherwise." 28 U.S.C. § 1447(d).

2. Respondent James Lewis ("Lewis") was injured on July 9, 1988, while operating a bulldozer manufactured by petitioner Caterpillar Inc. ("Caterpillar") and serviced by Whayne Supply Co. ("Whayne Supply"). Lewis alleged in his complaint that a hydraulic hose near the front of the bulldozer ruptured, allowing hydraulic fluid to escape. The fluid thereafter ignited, causing him to suffer burns. See J.A. 85-86. Liberty Mutual Insurance Group ("Liberty Mutual"), the insurance carrier for Lewis's employer, paid Lewis workers' compensation benefits on account of his injuries.

On June 22, 1989, Lewis brought suit in Kentucky state court against Caterpillar and Whayne Supply. Liberty Mutual intervened as a plaintiff, asserting its subrogation interest in

the workers' compensation benefits. Lewis contended that the fire and resulting injuries were the result of Caterpillar's negligence in manufacturing the bulldozer and failing to give adequate warnings of its dangerous condition, and of Whayne Supply's negligence in overhauling and maintaining the equipment. J.A. 86-87.

3. At the time the complaint was filed in state court, Caterpillar could not have removed the case to federal court because complete diversity of citizenship was absent. See *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Although Liberty Mutual, the intervening plaintiff, was a Massachusetts corporation with its principal place of business in Massachusetts, and Caterpillar, the defendant, was a Delaware corporation with its principal place of business in Illinois, both Lewis, the plaintiff, and Whayne Supply, the other defendant, were citizens of Kentucky.

On June 12, 1990, however, Caterpillar learned that Lewis had agreed to a settlement with Whayne Supply, the non-diverse defendant. J.A. 31-32.[1] Shortly thereafter, Caterpillar removed the case to the United States District Court for the Eastern District of Kentucky pursuant to 28 U.S.C. §§ 1441(a) and 1332. J.A. 30-33.

Lewis moved to remand the case to state court on the ground that the case was not removable because "there is not complete diversity [of citizenship] between the parties hereto." J.A. 36. Specifically, although Lewis conceded that

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[1] Although Lewis reached his settlement with Whayne Supply at an earlier time, he withheld information about the settlement from Caterpillar. Accordingly, Caterpillar did not learn of the settlement until June 12, and it removed the case as soon as it was able to confirm that the settlement had in fact been made. J.A. 31-35. On August 2, 1990, while this case was pending in federal court, Lewis filed in state court an agreed order purporting to dismiss Whayne Supply from the removed state action. J.A. 52.

he had settled his claims with Whayne Supply, he asserted that the settlement did not resolve Liberty Mutual's subrogation claim against Whayne Supply, and therefore that Whayne Supply remained a party to the suit. J.A. 36. Caterpillar responded that the settlement automatically invoked Liberty Mutual's right of subrogation against Whayne Supply as a matter of state law. J.A. 39-42. Kentucky law provides that, when an employee receives workers' compensation benefits and then recovers from the tortfeasor, the workers' compensation carrier may recover its proportionate share of the recovery. KRS 342.700(1). Lewis, however, excluded from his settlement with Whayne Supply that portion of the settlement funds to which Liberty Mutual was entitled by Kentucky law. Caterpillar took the position that Liberty Mutual's claim was derivative of Lewis's claim against Whayne Supply, which had been settled; that under Kentucky law the settlement automatically took account of Liberty Mutual's subrogation rights against Whayne Supply; that Lewis could not circumvent these derivative rights through settlement; and that Liberty Mutual's presence in the case therefore should not be viewed as destroying diversity. The district court agreed with Caterpillar that federal jurisdiction existed and denied the motion to remand on September 24, 1990. J.A. 53-56.

The case then proceeded through discovery and pretrial proceedings in the district court. On June 8, 1993, Liberty Mutual and Whayne Supply entered into a settlement of the subrogation claim and Whayne Supply formally was dismissed from the case. J.A. 79. Thereafter, the case was tried before a jury from November 15 through November 22, 1993, ending in a unanimous verdict for Caterpillar. J.A. 83. The court entered judgment for Caterpillar on November 23, 1993.

4. The court of appeals reversed. J.A. 84-90. In the Sixth Circuit's view, the district court should have remanded the case to state court in 1990 because complete diversity did

not exist at the moment of removal, and the lack of subject matter jurisdiction at the time of removal required it to vacate the district court's judgment and remand the case to state court. J.A. 87-90.[2] The Sixth Circuit explained that,

> at the time Caterpillar removed the case to federal court, plaintiff, a resident of Kentucky, remained a party to the case by virtue of his claim against defendant Caterpillar. Defendant Whayne Supply Co., a Kentucky corporation, was also a party to the case in light of intervening plaintiff Liberty Mutual's subrogation claim against it. Thus, complete diversity did not exist at the time the case was removed to federal court. Unfortunately, we must remand a case that has proceeded through judgment in the district court.

J.A. 89-90 (footnote omitted). The court of appeals evidently was of the view that the absence of complete diversity at the time of removal meant that "the district court lacked jurisdiction over this case." J.A. 90 n.3. The court below did not mention that diversity became complete when Whayne Supply was dismissed from the case pursuant to its settlement with Liberty Mutual, and that complete diversity existed at all times during the trial and when final judgment was entered.

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[2] The court of appeals rejected Caterpillar's argument that there *was* complete diversity when the case was removed because Liberty Mutual should not have been considered for diversity purposes. J.A. 90 n.2. This Court denied review of Caterpillar's challenge to this holding (J.A. 91), and we accordingly will not repeat the arguments on that point here.

SUMMARY OF ARGUMENT

1. The court of appeals was plainly wrong in holding that the judgment of the district court had to be reversed because diversity was not complete at the time of removal. This Court has made clear that, even when jurisdiction did not exist when a case was removed, a remand to state court is unnecessary so long as the jurisdictional defect was cured by the time of trial or judgment; the district court has jurisdiction to decide the case if it "would have had jurisdiction of the controversy had it been brought in the federal court in the posture it had *at the time of the actual trial of the cause or of the entry of judgment.*" *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 16 (1951) (emphasis added).

There is nothing anomalous in this rule. To the contrary, the Court has held in a variety of contexts that proceedings in a district court need not be vacated so long as jurisdiction was perfected by the time of judgment. This approach does not involve "jurisdiction retroactively conferred." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 836 (1989). Instead, it reflects a recognition that Congress established pragmatic rules of jurisdiction under which technical defects cannot be used to undo complete and otherwise fair proceedings. It therefore is indisputable that the district court had the authority to try and enter judgment in this case.

2. Because there is no jurisdictional defect that requires remand of the case, Lewis's contention must be that the federal removal statute was violated and that he accordingly has a statutory right to demand a remand to state court. But any such contention is insubstantial. Congress drafted the statutory removal provisions to encourage efficiency and avoid unnecessary relitigation, and this Court accordingly has interpreted the removal rules in a manner that "best promote[s] the values of economy, convenience, fairness, and comity." *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 353 (1983). Against this background, Lewis's contention fails for several reasons.

First, remand would be pointless because the statutory error (the removal of a case in which diversity was incomplete) was cured prior to trial. *Second*, the error was harmless: Lewis has not identified any manner in which he was prejudiced by having to try this case in a federal forum. And *third*, Lewis effectively waived his statutory objection to removal by failing to seek an immediate appeal of the district court's refusal to remand; in the meantime, of course, the jurisdictional defect was cured and the parties proceeded to trial and judgment. In this setting — where a remand would toss onto the trash heap six years of federal court proceedings and a six-day jury trial, requiring the parties to start the litigation over from scratch — Lewis would sacrifice congressional intent and common sense for the sake of "hypertechnical jurisdictional purity." *Newman-Green*, 490 U.S. at 837. This Court's decisions reject such an approach.

ARGUMENT

BECAUSE THE DISTRICT COURT PLAINLY HAD FEDERAL JURISDICTION AT THE TIME THAT THIS CASE WAS TRIED AND JUDGMENT WAS ENTERED, THE COURT OF APPEALS ERRED IN REVERSING THE JUDGMENT AND ORDERING A REMAND TO STATE COURT

The result mandated by the court of appeals in this case may fairly be characterized as nonsensical. It is undisputed that there was complete diversity between the parties both at the time of trial and when judgment was rendered. There can be no doubt that the district court had jurisdiction to decide the case. And there is no suggestion that the district court's decision of the case denied Lewis particular rights conferred by federal law. Nevertheless, the court below held that the district court's judgment must be vacated because diversity between the parties was not complete during an *earlier* stage

of the litigation — a holding that renders nugatory a six-day jury trial and requires remand of the case to state court, where the parties will have to start the litigation over a 1988 injury from scratch.

The delay — and the waste of judicial and litigants' resources — that will flow from this holding are manifest. Yet the court of appeals' rule is not necessary to preserve the integrity of federal jurisdiction. It does not advance any interest served by the removal statute. And it frustrates the clear federal policy of avoiding delay and duplicative proceedings when the right to remove is invoked. This accordingly is, quite plainly, a case where Caterpillar "should not be compelled to jump through judicial hoops merely for the sake of hypertechnical jurisdictional purity." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 837 (1989). Because the *only* value served by the decision below is that of the most "hypertechnical" and wooden formalism, that decision should be set aside.

A. The District Court Had Subject Matter Jurisdiction To Decide The Case

The court of appeals evidently accepted Lewis's contention below that "the district court lacked subject matter jurisdiction because complete diversity between the parties did not exist *at the time of removal.*" J.A. 87-88 (emphasis added). See J.A. 90 n.3 ("the district court lacked jurisdiction over this case"). That conclusion, however, was fundamentally wrong. In fact, repeated decisions of this Court — none of which were cited or discussed by the court below — make clear that a federal court has the power to decide a case when jurisdiction exists *at the time of that court's decision*. Because it is undisputed that diversity was complete at the time of trial and judgment, the district court plainly had jurisdiction to decide the case.

1. This Court long ago settled the proposition that remand to the state court is unnecessary even if jurisdiction

did not exist at the time of removal, so long as the district court had subject matter jurisdiction at the time of judgment. In *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 16-17 (1951) (emphasis added) the Court explained:

> There are cases which upheld judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of judgment. That is, *if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case.* This circumstance was relied upon as the foundation of the holdings.

The Court went on to hold that the district court's judgment had to be vacated in *Finn* because "[t]he posture of the case *even at the time of judgment* also barred federal jurisdiction." *Id.* at 17 (emphasis added).

The Court subsequently confirmed that *Finn* meant exactly what it said, holding that the judgment in a case that had been improperly removed to federal court did not have to be set aside because jurisdiction existed at the time of decision. In *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699, 702 (1972) (emphasis added), the Court declared that

> [l]ongstanding decisions of this Court make clear * * * that where after removal a case is tried on the merits without objection and the federal court enters judgment, *the issue in subsequent proceedings on appeal is not whether the case was properly removed*, but whether the federal district court would have had original jurisdiction of the case had it been filed in that Court.

The Court characterized this as a "requirement that jurisdiction exist *at the time of judgment*" (*id.* at 705 (emphasis added)); in *Finn*, the *Grubbs* Court added, "[s]ince complete diversity did not obtain *even as of the date of judgment*, and since there was no other basis for federal jurisdiction, this Court reversed the judgment of the Court of Appeals, which had held the case properly removable." *Id.* at 704 (emphasis added).

Citing *Finn* and *Grubbs*, other courts have agreed that, even when jurisdiction did not exist at the time of removal, the crucial question is whether complete diversity (or some other ground of federal jurisdiction) was present at the time of judgment. See, *e.g.*, *Able* v. *Upjohn Co.*, 829 F.2d 1330, 1333 (4th Cir. 1987) (Wilkinson, J.) ("The Supreme Court has recognized [in *Finn*] that a judgment entered in a case that was improperly removed may stand where, as here, the judgment works no expansion of federal jurisdiction"), cert. denied, 485 U.S. 963 (1988); *Gould* v. *Mutual Life Ins. Co.*, 790 F.2d 769, 773 (9th Cir.), cert. denied, 479 U.S. 987 (1986); *Sheeran* v. *General Electric Co.*, 593 F.2d 93, 97 (9th Cir.), cert. denied, 444 U.S. 868 (1979). The leading commentators in the area therefore have concluded that "even where a case is not, or does not appear to be within the jurisdiction of the federal court *at the time of removal*, a judgment entered by a trial court is valid if at the time of the actual trial or the entry of judgment the requisites of original jurisdiction existed." 1A MOORE'S FEDERAL PRACTICE ¶ 0.157 [11.-3], at 172 (2d ed. 1996) (emphasis in original).

2. There is nothing anomalous in this rule. To the contrary, the Court has held in a variety of settings that proceedings in a district court need not be vacated so long as jurisdiction is perfected by the time of trial or judgment — or, indeed, while the case is on appeal. To be sure, the Court has indicated that "the existence of federal jurisdiction ordinarily depends on facts as they exist when the complaint is filed." *Newman-Green*, 490 U.S. at 830. The Court has

hastened to add, however, that "[l]ike most general principles * * * this one is susceptible to exceptions." *Ibid.*

The Court sketched out some of these exceptions in *Newman-Green*, where it stated that Fed. R. Civ. P. 21 "invests district courts with the authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." 490 U.S. at 832. And the Court went on to hold that when complete diversity did not exist at the time of trial, courts of appeals also have "the power to dismiss jurisdictional spoilers" (*id.* at 830); so long as jurisdiction is perfected while the case is on appeal, the absence of diversity at an earlier stage of the case does not render the district court proceedings nugatory. See *id.* at 835-837. Indeed, this Court itself has permitted the addition of parties when "necessary to establish the existence of a justiciable case" (*id.* at 834 n.8, citing *Mullaney* v. *Anderson*, 342 U.S. 415 (1952)), holding that a cure for the jurisdictional defect even at that late stage of the case made it unnecessary to "'dismiss[] the petition and thereby requir[e] the plaintiffs to start over again in the District Court." *Id.* at 833. See *id.* at 835 (noting that in *Carneal* v. *Banks*, 23 U.S. (10 Wheat.) 181 (1825), "this Court itself dismissed the nondiverse parties while acting in an appellate capacity").[3]

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[3] *Finn* reflects an application of this principle. On remand from this Court's decision in that case, the plaintiff was allowed to dismiss his claims against the non-diverse defendant. With federal jurisdiction thus perfected, the court of appeals held that the original trial was not a nullity and a new judgment was entered on the verdict returned at that trial. *Finn* v. *American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953). This Court denied review of the decision affirming that judgment. 347 U.S. 912 (1954). See *Riggs* v. *Island Creek Coal Co.*, 542 F.2d 339, 343 (6th Cir. 1976); 1A MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.157[11.-3], at 171.

This holding, like the rule stated in *Finn* and *Grubbs*, does not involve "jurisdiction retroactively conferred." *Newman-Green*, 490 U.S. at 836. Instead, it reflects a recognition that Congress established pragmatic rules of jurisdiction under which technical defects cannot be used to undo complete and otherwise fair proceedings, so long as jurisdiction was perfected at some point prior to the completion of the litigation. As the Court put it in *Newman-Green*, "[a]ppellate-level amendments to correct jurisdictional defects may not be the most intellectually satisfying approach to the spoiler problem, but, as Judge Posner eloquently noted, because 'law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities.'" *Id.* at 836-837 (citation omitted).

This focus on the creation of a workable system that avoids setting aside or duplicating completed proceedings has led the Court to hold in a wide range of contexts that it is not necessary for jurisdictional requirements to be satisfied continuously throughout the course of a proceeding. A remand to state court, for example, is not necessary when the amount in controversy falls below the jurisdictional minimum after removal; "'events occurring subsequent to removal which reduce the amount recoverable ... do not oust the district court's [diversity] jurisdiction.'" *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 356 n.12 (1983), quoting *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 293 (1938) (ellipses and bracketed material added by the Court). Similarly, jurisdiction is retained if a party changes citizenship after removal in a manner that destroys complete diversity. See *St. Paul Mercury Indemnity Co.*, 303 U.S. at 293-296; 14A C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3721, at 214 (1985).

Indeed, in this Court Lewis evidently acknowledges the point and implicitly concedes that the district court had jurisdiction to decide the case. In his brief in opposition to the petition for certiorari (at 6), Lewis recognized that, had

he not sought a remand at the time of removal, he would have waived his asserted right to trial in state court. But it is, of course, black-letter law that subject matter jurisdiction cannot be conferred by consent or waiver. See, *e.g.*, *Finn*, 341 U.S. at 17-18. Lewis's concession that he could have waived his right to remand therefore necessarily concedes as well that the district court had subject matter jurisdiction. Thus, it is indisputable that the district court had the authority to try and enter judgment in this case, and that the court of appeals erred in holding that the judgment had to be vacated for lack of subject matter jurisdiction.

B. Even When A Case Is Improperly Removed From State Court, The Removal Statutes Do Not Require A Remand When The Error Was Cured, Was Harmless, Or Was Waived

Since there is no *jurisdictional* defect that requires remand of this case, Lewis's contention must be that the federal removal statutes were violated and that those provisions grant plaintiffs a *statutory* right to demand a remand to state court whenever removal was improper. Lewis did not, however, make any such argument either in the court below or in his brief in opposition to the petition for certiorari.[4] In any event, if this is Lewis's position it plainly lacks merit, for several reasons. *First*, the statutory error here (removal of a case in which diversity was incomplete) was cured prior to trial when the non-diverse party was dismissed. *Second*, the error was harmless; Lewis received a fair trial before a competent tribunal. And *third*, Lewis effectively waived his objection to removal by failing to seek an immediate appeal of the district court's refusal to remand,

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[4] Lewis therefore is foreclosed from raising the argument now. See, *e.g.*, *Lytle* v. *Household Mfg. Co.*, 494 U.S. 545, 551-552 n.3 (1990).

a failure that rendered his statutory objection moot when jurisdiction subsequently was perfected.

1. "Removal proceedings are in the nature of process to bring the parties before the United States court." *Mackay* v. *Uinta Development Co.*, 229 U.S. 173, 176 (1913). To be sure, certain errors in the removal process[5] may be urged in the district court as grounds for remand. And if those errors are overlooked by the district court, are *not cured during trial,* and were not waived by the party seeking remand, they may be considered on appeal[6] — subject, of course, to the

[5] Examples might include removal to the wrong federal judicial district or a failure of all defendants to seek removal. See 28 U.S.C. § 1446.

[6] That apparently was the situation in *Grubbs*, where there was an error in the removal process — an error that was not cured prior to trial — rather than an absence of jurisdiction at the time of removal. There, a New York corporation brought suit against a Texas resident in Texas state court. The defendant subsequently filed a cross-action against the United States pursuant to 28 U.S.C. § 2410. See 405 U.S. at 700-701. The United States then removed the entire action to federal court pursuant to 28 U.S.C. § 1444, which permits removal in actions brought under Section 2410; the plaintiff did not object to removal and the court proceeded to rule for the defendant.

On appeal, the court of appeals on its own motion concluded that Section 2410 could not be invoked in the case, that Section 1444 therefore provided no basis for removal, that no other basis for removal was available, and that the case accordingly must be remanded to state court. See 405 U.S. at 702. In reversing, this Court observed that the district court had diversity jurisdiction to decide the controversy between the New York plaintiff and the Texas defendant (even though that diversity did not itself provide a ground for removal, because under 28 U.S.C. § 1441(b) removal is permitted on diversity grounds only if none of the defendants are residents of the forum state). See 405 U.S. at 704-705. Yet the statutory removal error had never been cured because Section 1444 remained unavailable and there was no other statutory basis for removal.

It was in this setting that the Court applied the rule "that where after removal the case is tried on the merits *without objection* and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Id.* at 702 (emphasis added). It made sense in that context to note that there had been no objection to removal because the removal error — the mistaken invocation of Section 1444 — had never been cured. Here, in contrast, the error (the lack of diversity) *was* cured after removal.

normal harmless error inquiry. See 28 U.S.C. § 2111; 1A MOORE'S FEDERAL PRACTICE, *supra*, ¶0.157[10.-2], at 165. But however much sense that approach might make when the mistake in the removal process is never corrected, it makes no sense at all to permit a removal error to be challenged on appeal after final judgment when, as in this case, the defect *was cured prior to trial.* Setting aside the judgment in such a case because the district court made what has proved to be a wholly inconsequential error would represent a triumph of "hypertechnical" formalism over common sense and sound judicial administration.

In fact, Lewis's approach plainly is inconsistent with the intent of Congress, which drafted the statutory removal provisions to encourage efficiency and avoid unnecessary relitigation. For example, because Congress was aware that "federal removal provisions may become a device affording litigants a means of substantially delaying justice" (*Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 355 (1976) (Rehnquist, J., dissenting)), it provided in 28 U.S.C. § 1447(d) that parties may not appeal a district court's decision to remand a case to state court, "whether [the decision is] erroneous or not." *Thermtron Products*, 423 U.S. at 343. As at least one court of appeals has recognized, a rule that

precludes a remand after trial so long as the district court had jurisdiction at the time of judgment "promotes finality and judicial efficiency [in the same manner] as does 28 U.S.C. § 1447(d)." *Gould*, 790 F.2d at 774.

Similarly, Congress has acted to remove other inefficiencies from the removal process. At one time the court-created doctrine of "derivative jurisdiction" was thought to require dismissal of suits removed to federal court, even though the federal court had jurisdiction to decide the case. That doctrine was premised on the view that "[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U.S. 377, 382 (1922). See *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 26 n.27 (1983).

Under this rule, if a plaintiff brought suit in state court on a claim over which the federal courts had exclusive jurisdiction, and the case subsequently were removed to federal court, the federal court would be obligated to dismiss the suit because the state court would have lacked jurisdiction to decide it. See 1A MOORE'S FEDERAL PRACTICE, ¶ 0.157[3.-1], at 55-58 (citing cases). Not surprisingly, this approach was criticized as "indefensibl[e] from the standpoint of practical judicial administration." *Id.* 0.157[3.-2], at 58; see *id.* at 59-60. Congress agreed, providing in 28 U.S.C. § 1441(e) that "[t]he court to which [a] civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." See H.R. Rep. No. 423, 99th Cong., 2d Sess. 13 (1986). The rule advanced by Lewis is in clear tension with this statutory structure, which Congress crafted to eschew the technical and to limit delay.

2. Here, these same "practicalities weigh heavily in favor" of a rule that would leave the district court's judgment intact. *Newman-Green*, 490 U.S. at 837. The Court has noted that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Id.* at 836. As a consequence, the Court has sought to interpret the rules of removal in a manner that "best promote[s] the values of economy, convenience, fairness, and comity. Both litigants and States have an interest in the prompt and efficient resolution of controversies based on state law." *Carnegie-Mellon University*, 484 U.S. at 353. Indeed, it is particularly important to avoid an overly rigid approach in the removal area, which "remains technically difficult" (1A MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.157[1.-3], at 44) and where the occasional immaterial mistake may be unavoidable.

With these principles in mind, as Judge Wilkinson wrote for the Fourth Circuit in a case identical to this one, "judicial economy and finality require that the district court's judgment be allowed to stand. Where a matter has proceeded to judgment on the merits and principles of federal jurisdiction and fairness to parties remain uncompromised, to disturb the judgment on the basis of a defect in the initial removal process would be a waste of judicial resources." *Able*, 829 F.2d at 1334. That surely describes the situation in this case. This suit was filed almost seven years ago; it was removed to federal court almost six years ago. It was resolved in a six-day jury trial before a competent court some two and one-half years ago, in November 1993. Yet Lewis would vacate the judgment entered by that court, throw six years' worth of federal court proceedings into the trash bin, and start the case over from the beginning, all because the district court made what proved to be an inconsequential error at the time of removal.

Lewis's approach is more faithful to *Bleak House* than it is to the requirements of federal law. The Third Circuit's observation, addressed to a proceeding, like this one, in which there was "a brief lack of complete diversity at the beginning of the case" (*Knop* v. *McMahon*, 872 F.2d 1132, 1139 n.16 (3d Cir. 1989)), is equally appropriate here:

> This factually complex dispute has been completely adjudicated by a court which had jurisdiction over the parties throughout the trial and at the time of judgment. The parties and the court have devoted extensive resources to its adjudication. They have had the benefit of a full assessment of the disputed evidence by an impartial factfinder. To erase the result of that process by requiring them to litigate these claims all over again in a state court does not seem to us necessary under the case law with respect to removal for diversity.

3. That conclusion is especially apt because, "[i]n the instant case, it is evident that none of the parties [were] harmed" by trial of the case in federal rather than state court. *Newman-Green*, 490 U.S. at 838. See *id.* at 833. The federal court was, of course, fully competent to resolve Lewis's claims. Indeed, because complete diversity in fact existed at the time of trial, federal court was the presumptively *better* forum; trial there served to "protect nonresidents from the local prejudices of state courts." 14A C. Wright, A. Miller & E. Cooper, *supra*, § 3721 at 187. See Rothfeld, *Rationalizing Removal*, 1990 B.Y.U.L. REV. 221, 226 (removal assures "the availability of a sympathetic and competent forum * * * to prevent bias against out-of-state litigants").

In these circumstances, as the leading commentators in the area have suggested,

> [t]he federal courts could * * * make a very constructive contribution by eschewing the technical. Hypertechnical application of the removal statutes furthers no goal of federalism and can be disruptive of state jurisdiction. While the purposes of the removal statute should be effectuated, we believe that harmless error should be treated as harmless error.

1A MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.157[13], at 199. See 28 U.S.C. § 2111 (appellate courts shall ignore "errors or defects which do not affect the substantial rights of the parties"). This principle requires reversal of the decision below.[7]

4. It should be added that the rule upon which we rely does not leave the plaintiff without a remedy when the district court errs in declining to remand a case to state court. If the district court accepts a removed case in violation of the removal statute and the defect is never cured, the plaintiff may seek remand (see 28 U.S.C. § 1447(c)) and may present the error on appeal after final judgment. See *Mansfield, Coldwater & Lake Michigan R. Co.* v. *Swan*, 111 U.S. 379 (1884); Rothfeld, *supra*, 1990 B.Y.U.L. REV. at 242 & n.106. And pursuant to 28 U.S.C. § 1292(b), the plaintiff may seek certification to take an immediate interlocutory appeal of the district court's refusal to remand. The courts generally have recognized the availability of certification on the question whether removal was proper (see 1A MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.169 [2.-3], at 707; 14A C. Wright, A. Miller, & E. Cooper, *supra*, § 3740, at 596-598), and the procedure had been recognized in the Sixth Circuit prior to the removal of this case. See *Union Planters Nat'l Bank of Memphis* v. *CBS, Inc.*, 557 F.2d 84, 86 (6th Cir. 1977). Lewis, however, failed to seek certification under Section 1292(b).

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[7] The jurisdictional defect here, before it was cured, was purely statutory; the Constitution itself, of course, does not require complete diversity. See *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530-531 (1967).

This failure effectively waived Lewis's complaint that the procedure followed on removal failed to comply with the requirements of the removal statute. "Interests of finality and judicial economy * * * strongly suggest that the district court's judgment should not be disturbed where a party fails to avail himself of a remedy that might earlier have resolved the removal question." *Able*, 829 F.2d at 1333. Thus,

> [w]hen a party elects to forego an interlocutory appeal, he runs the risk that the federal court will enter judgment on the basis of complete diversity. * * * This rule forces parties to give careful consideration to the importance of their objection to removal, [and] brings the benefit of early determination of the proper forum.

Able, 829 U.S. at 1333-1334. See *Gould*, 790 F.2d at 774. The risk addressed by Judge Wilkinson in *Able*, of course, is what materialized here: during the period between removal and final judgment diversity became complete. Lewis accordingly forfeited his opportunity to challenge the propriety of the removal when he failed to pursue an interlocutory appeal.

This conclusion is strongly supported by the analysis of three Justices in *Alligator Co., Inc.* v. *La Chemise Lacoste*, 421 U.S. 937 (1975) (White, J., dissenting from denial of certiorari). They were of the view that, where the propriety of removal could be raised in an interlocutory appeal (in that case, on appeal from denial of a preliminary injunction), "*Grubbs* * * * should be extended so as to *require* that the question be raised in such an appeal. Otherwise, wasteful litigation is invited, and the losing party on the merits is given another bite at the apple." *Id.* at 938-939 (emphasis in original).[8] Cf. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517,

[8] In fact, it appears that federal subject matter jurisdiction was absent in that case even at the time of the court of appeals' judgment, which seemingly made a remand to state court mandatory. See *La Chemise Lacoste* v. *Alligator Co., Inc.*, 506 F.2d 339, 343-346 (3d Cir. 1974). That consideration may explain the Court's denial of review.

529-530 (1988) (Court relied in part on the availability of interlocutory appeal under Section 1292(b) in refusing to permit interlocutory appeals as of right challenging *forum non conveniens* determinations). In this case as well, where Lewis failed to pursue an opportunity to obtain immediate review of the order denying a remand, his dilatory approach should not be rewarded by allowing him "to start over in the District Court," an outcome that "'would entail needless waste and runs counter to effective judicial administration.'" *Newman-Green*, 490 U.S. at 833, quoting *Mullaney*, 342 U.S. at 417.

In sum, the remand ordered by the court of appeals represents a gross miscarriage of justice. The jurisdictional defect in the case was cured, Lewis was not prejudiced, and he received a trial in federal court that was fair in every respect. No decision of this Court, no requirement of any federal statute, and no principle of sound judicial administration requires setting aside the results of that trial and giving Lewis a second bite at the apple in state court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JAMES B. BUDA
Caterpillar Inc.
100 N.E. Adams St.
Peoria, IL 61629-7310

WILLIAM F. MAREADY
Robinson Maready Lawing
& Comerford, L.L.P.
380 Knollwood St.
Suite 300
Winston-Salem, NC 27103

KENNETH S. GELLER*
MICHAEL R. FEAGLEY
JOHN E. MUENCH
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

LESLIE W. MORRIS II
Stoll, Keenon & Park, LLP
201 E. Main St.
Suite 1000
Lexington, KY 40507

* *Counsel of Record*

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No. 95-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CATERPILLAR, INC.,

Petitioner,

v.

JAMES DAVID LEWIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT

Leonard J. Stayton
(*Counsel of Record*)
P. O. Box 1386
Inez, Kentucky 41224
(606) 298-5117

Paul Alan Levy
Alan B. Morrison
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Respondent

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QUESTIONS PRESENTED

1. May a federal court judgment be allowed to stand when there was no subject matter jurisdiction when the case was removed from state court over the plaintiff's timely objection, so long as there was complete diversity at the time of judgment?

2. Does failure to seek interlocutory review of an order denying remand to state court waive the right to object to the subject matter jurisdiction of the federal court at time of removal?

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BRIEF FOR RESPONDENT

The issues that the Court has granted certiorari to decide arise from a tension between the clear commands of the removal statutes and the Federal Rules of Civil Procedure that support respondent's position, and the superficially appealing notion that, when a case has been tried to judgment based on jurisdiction that developed after removal, the courts should find some way to avoid retrial. But the Judicial Code and Federal Rules forbid removal where diversity of citizenship becomes complete more than a year after the filing of the state court action, and require jurisdictional defects to produce a remand to state court so long as they are called to the district court's attention before judgment. Those provisions are not waivable by the courts or by the failure of a party to seek discretionary interlocutory apppeal, whether the basis is efficiency or supposed equitable consideration. And however desirable it may be to preserve the results of a trial over "technical" objections based on federal procedure and

jurisdiction, petitioner's approach would not only encourage, but indeed require, piecemeal appeals whenever removal is upheld over the plaintiff's objections.

STATUTES INVOLVED

28 U.S.C. § 1292(b) provides, in pertinent part, as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . ..

28 U.S.C. § 1446(b) provides, in pertinent part, as follows:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1447(c) provides, in pertinent part, as follows:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

STATEMENT

Respondent James David Lewis, an employee of Gene Wilson Enterprises, was injured driving a bulldozer that was manufactured and sold by petitioner Caterpillar, Inc., and overhauled, serviced and maintained by Whayne Supply Company. The injury occurred when a hose ruptured, spraying hydraulic fluids on parts of the machine and causing a fire. Respondent obtained workers compensation benefits that were paid by Liberty Mutual Insurance Group, his employer's insurer.

On June 22, 1989, respondent sued petitioner and Whayne Supply in Lawrence Circuit Court, Lawrence County, Kentucky. He alleged manufacture of a defective product creating unreasonable danger against petitioner, negligent maintenance against Whayne Supply, and inadequate warning and breach of warranty against both defendants. His complaint sought medical, economic, mental anguish, and punitive damages. While the case was pending in state court, Liberty Mutual intervened as a plaintiff to assert subrogation rights in plaintiff's recoveries. As permitted by Kentucky law, K.R.S. § 342.700, Liberty Mutual's complaint in interven-tion named both itself and respondent as plaintiffs.

Even though there was diversity of citizenship between petitioner (a Delaware corporation) and respondent (a Kentucky citizen), petitioner could not remove the case because Whayne Supply was also a Kentucky citizen. A removal no-

tice must usually be filed within thirty days of receipt of the initial pleading, but this limit does not apply if the case is not then removable. In that event, removal is required within thirty days of receipt of the "amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S. C. § 1446(b). However, if removal is based on diversity of citizenship, there is an outside deadline for removal of one year from the date of the commencement of the action. *Id.*

On June 21, 1990, the day before the one-year deadline, petitioner filed a notice of removal in the United States District Court for the Eastern District of Kentucky, based on diversity of citizenship under 28 U.S.C. § 1332. Petitioner did not claim that it had received any "pleading, motion, order or other paper" divesting Whayne Supply of its party status in the case, thereby creating complete diversity. Nor did it argue that respondent's complaint against Whayne Supply was anything but a genuine effort to recover damages from it, or specifically that the joinder of Whayne Supply was fraudulent or for the purpose of defeating diversity. Instead, it alleged that, on June 12, it had learned from Whayne Supply that it either had, or "had probably," settled with respondent. JA 35. Although petitioner could not point to any "paper" establishing this fact, it argued that Whayne Supply would undoubtedly be dismissed from the action pursuant to this settlement, and its counsel submitted an affidavit averring that he "expect[ed]" to receive a writing to that effect at some unspecified time in the future. JA 32, 35. Needless to say, given the date on which these papers were executed, this would have been after the one-year deadline for removal.

Within days of removal, respondent objected to removal and moved to remand the case to state court. JA 36-37, 44-46. Respondent argued that complete diversity was lacking in several respects. First, he contended that, although he had settled some of his claims against Whayne Supply, Liberty

Mutual had not settled its claim against Whayne, and accordingly that this Kentucky citizen was still a party to the action. Second, he observed that Liberty Mutual was involved in the case by virtue of having insured Gene Wilson Enterprises, another Kentucky citizen that was, in fact, eventually added to the case as a third party defendant, JA 2, and never dismissed through time of judgment. Third, he noted that despite the settlement, Caterpillar had not received any paper within the thirty days before it filed its notice of removal showing the elimination of Whayne Supply as a defendant, even with respect to respondent's original claim against it. Indeed, such a paper was not filed until August 2, 1990. JA 47. Finally, he pointed out that his settlement with Whayne Supply was only partial, because he did not (and would not) settle the part of his claims against Whayne Supply to which Liberty Mutual had a subrogation interest.[1]

By unpublished order, the district court rejected these arguments and refused to remand the case. It held that Gene Wilson Enterprises' citizenship was irrelevant, and that the absence of formal dismissal of Whayne Supply did not mean that it still had to be considered a defendant for diversity purposes. Without addressing either the issue of Liberty Mutual's claim against Whayne Supply, nor respondent's interest in that claim, the district court held that diversity was complete and hence that there was federal jurisdiction. JA 55. Because that ruling was not a final decision, no appeal was

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[1] He did not limit his settlement in this way collusively, for purposes of jurisdiction; nor did it leave respondent with no claims against Whayne Supply. Because the settlement was structured this way, Liberty Mutual could not take any of his settlement proceeds. His claim for subrogable damages remained, although it was Liberty Mutual that had the primary incentive to pursue it. He retained his own interest in the subrogable claim because, under K.R.S. § 342.700, he could still recover from Liberty Mutual's subrogation damages his reasonable attorney's fees for the case.

then available under 28 U.S.C. § 1291; nor did respondent seek discretionary review under 28 U.S.C. § 1292(b).

Discovery, which had begun while the case was in state court, JA 34, continued, and the parties submitted their first witness lists and pretrial conference papers in July 1991, about nine months after remand had been denied. In June 1993, some two years after that, and four years after the action had been commenced in state court, Liberty Mutual and Whayne Supply settled their controversy and Whayne Supply was dismissed from the case. This was almost three years after petitioner had filed for removal.

The case was heard by a seven member jury, JA 81, for six days in November 1993, JA 6-7, resulting in a unanimous verdict for petitioner. Respondent appealed to the United States Court of Appeals for the Sixth Circuit. He argued that the trial had been infected by several errors, including denial of discovery, denial of sanctions for discovery misconduct, exclusion of evidence, and failure to give required jury instructions.[2] On the removal issue, he argued that the question was whether diversity had existed at removal, and contended that it did not, for three reasons. First, Whayne Supply had remained a defendant to the subrogation claim filed on behalf of both himself and Liberty Mutual; second, under the settlement he himself retained a claim against Whayne Supply for subrogable benefits; and third, removal had been effected prematurely because of the absence of any paper altering the lack of complete diversity within a year of the commencement of the action.

[2] As shown by the appellate briefs below (copies are lodged with the Clerk), petitioner errs in stating, Br. 21, that respondent had no objections to the conduct of the federal court proceeding.

Petitioner defended the removal decision solely by arguing that there was jurisdiction at the time of removal. It disputed respondent's characterization of the facts, arguing that respondent's settlement with Whayne Supply was enough to warrant removal, even before papers were filed finalizing the settlement and dismissing that defendant. The bulk of its brief, however, like the bulk of respondent's brief, was devoted to the merits of the case.

The court of appeals reversed, agreeing that removal was improper. It held that Liberty Mutual's subrogation claim against Whayne Supply was sufficient to keep Whayne as a defendant in the case, thus destroying complete diversity and barring jurisdiction at the time of removal. JA 89-90. The court found it unnecessary to consider either respondent's arguments based on his own remaining claim against Whayne Supply or his various arguments on the merits.

Petitioner sought rehearing, presenting for the first time the issues on which this Court has granted certiorari. This petition was denied without comment.[3]

[3] Petitioner argues, Br. 13 n.4, that because respondent did not discuss, below or in opposition to certiorari, the issues on which certiorari has been granted, he may not brief them. We disagree, but if the Court is unwilling to hear such arguments, we urge that the petition be dismissed as improvidently granted because there would then remain nothing to litigate. Indeed, **petitioner's** failure to discuss these issues below before its petition for rehearing undercuts its own claim for review in this case, because raising a question in a petition for rehearing is generally insufficient to preserve the issue. *Hanson v. Denckla*, 357 U.S. 235, 243-244 (1958). Admittedly, because respondent, then represented only by Kentucky counsel, did not cite this omission in his Opposition, the point "may be deemed waived," Supreme Court Rule 15.2, but the Court may act on this point should it choose to do so.

SUMMARY OF ARGUMENT

1. Because there were Kentucky citizens on both the plaintiffs' side and the defendants' side of this case, both when it was filed in June 1989 and when it was removed to federal court in June 1990, there was no federal jurisdiction. Thus, as the court of appeals held, the district court erred when it refused to remand the case to state court. The case did not become removable until the Kentucky defendant was dismissed in June 1993, four years after the case was commenced and a few months before trial.

Longstanding precedent requires that federal removal statutes be construed narrowly to protect state courts from being divested of their authority, thus impinging on state sovereignty, without an express Congressional grant of authority for the removal. Under 28 U.S.C. § 1447(c), a case must be remanded whenever "it appears" that the district court lacks subject matter jurisdiction, so long as this fact "appears" at some time before judgment. And 28 U.S.C. § 1446(b) provides that, when there is no federal jurisdiction at the time of filing, a case may be removed based on diversity that develops during the course of the litigation only if that happens within one year or less from the date when the case began in state court. Petitioner's argument, that the creation of complete diversity four years after the beginning of the state court excuses the district court's erroneous ruling on the issue of remand, flies in the face of both provisions.

Petitioner rests its argument almost entirely on a single case, *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972). *Grubbs* does not stand for the proposition that lack of diversity at the time of removal can be cured whenever diversity develops after the case was removed. In *Grubbs*, there was complete diversity when the case was filed but the case was not removed until the United States became a party. There was no objection from anybody at that time, particular-

ly the party that lost the judgment. Only after losing did one party attack the district court's jurisdiction to rule against it. At most the case stands for the proposition that, even if a case is improperly removed, if there is no objection to removal until after judgment, then the judgment's validity depends, not on the propriety of the removal, but rather on the existence of federal jurisdiction at time of judgment.

Surely this Court would not have overturned a hundred years of precedent requiring that there be jurisdiction both when the case is filed and when it is removed without saying so specifically. And, because *Grubbs* was decided 16 years before the 1988 amendments that established the one-year limit on removal based on diversity that develops during the litigation, *Grubbs* cannot be controlling here.

Petitioner argues that "judicial efficiency" forbids overturning a trial that was conducted under conditions of complete diversity, as well as that respondent was in no way harmed by the fact that trial was held in federal rather than state court. Neither argument is sound.

It is always burdensome to repeat a trial because of errors committed either during or before the trial occurred, but that is no more true in the removal context than it is in any other situation. If a defendant can avoid the explicit statutory ban on removal based on diversity developing more than a year after the case was filed, by removing before diversity develops, and hoping to hang onto the federal court until non-diverse parties can be eliminated, defendants will have an enormous incentive to attempt wrongful removals, and the statutory limitation will be rendered useless. Indeed, if the mere existence of jurisdiction suffices to cure a wrongful removal, then all of the various procedural requirements for removal will become unenforceable.

Finally, respondent would have enjoyed several advantages in state court that he was denied in federal court. Indeed, the reason why institutional defendants like petitioner and its amicus curiae are so concerned to protect the "right to removal" is precisely that they believe that their interests are better protected in federal court. They cannot have it both ways by saying that it made no difference to respondent.

2. Nor did respondent waive his objection to removal by not seeking permission to take an interlocutory appeal under 28 U.S.C. § 1292(b). Section 1447(c) sets forth the procedures that must be followed to object to removal, and Federal Rule of Civil Procedure 12(h) makes clear that jurisdictional defenses are not waived if they are made at any time in the district court. Respondent met both requirements, and petitioner's suggestion of additional procedural hurdles is properly addressed to Congress or to the Rules Committees.

Nor is petitioner's proposal sound. Section 1292(b) appeals are not designed to be routinely used whenever allegedly erroneous removal decisions are made. Not only does section 1292(b) have several requirements that will often not be met — and that were probably not met in this case — but a rule that failure to seek permission for such an interlocutory appeal waives jurisdictional objections would effectively force all unsuccessful opponents of removal to pursue such appeals. In their haste to protect the judgment here, petitioner and its amicus lose sight of "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

Section 1292(b) appeals are particularly burdensome to the judicial system (requiring preliminary evaluation by both the district court and the court of appeals before the appeal

can even be heard on the merits). Moreover, many such appeals will ultimately prove unnecessary because many cases "go away" before they reach final judgment. In the end, therefore, petitioner's proposal will actually add much more burden to the federal judiciary than would be saved by avoiding a few post-judgment appeals.

ARGUMENT

I. Both the Language of the Statute and the Underlying Policies of Federalism Forbid Lack of Jurisdiction at the Time of Removal From Being Cured by the Development of Complete Diversity After the Time Permitted by Congress.

The jurisdiction of the federal courts, whether of cases originally filed in the district courts or cases removed to federal court from state court, is governed by 28 U.S.C. §§ 1331 *et seq*. In this case, petitioner claims that there was complete diversity of citizenship between the parties, thus creating subject matter jurisdiction under 28 U.S.C. § 1332, and warranting removal under 28 U.S.C. § 1441, pursuant to the procedures set forth in 28 U.S.C. §§ 1446 and 1447.

As this Court has repeatedly held, the first obligation in a case of statutory construction is to examine the language of the statutes in question. Thus, in order to determine whether removal in this case was proper — and thus whether the trial court erred in reaching the merits by trial or otherwise — it is necessary to examine the language of sections 1441(a), 1446(b) and 1447(c), a task that the petitioner fails to undertake. Indeed, one can read the entire argument section of petitioner's opening brief without encountering either the actual text of these statutes or any discussion of their language, with the exception of section 1441(e), which petitioner acknowledges is not involved in this case.

Moreover, this Court has long adhered to a firm rule requiring "strict construction" of removal statutes, reflecting Congress' policy of carefully limiting the ability of state court defendants to impinge on state sovereignty by removing actions from state court:

> Not only does the language of the Act of 1887 [section 1441's precursor] evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'
>
> *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941), *quoting Healy v. Ratti*, 292 U.S. 263, 270 (1934).

Again, this fundamental canon of construction of the removal statutes goes unmentioned by petitioner.

Section 1441(a) provides that, unless "otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants . . . ." Section 1446(b) requires a notice of removal to be filed within thirty days of the defendant's receipt of a copy of the initial pleading setting forth the plaintiff's claim for relief. The second paragraph of that section provides that, "[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant" of a later "amended pleading, motion, order or other paper" from which the case's removability "may first be ascertained . . . except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action."

For over one hundred years, this Court has consistently held that, in order to warrant removal, there must be federal jurisdiction both at the time the state action is commenced and at the time of removal. *Gibson v. Bruce*, 108 U.S. 561 (1883). Subject to the well-pleaded complaint rule, the determination of removability is based, not on some abstract notion of what a case ought to be about, but rather on the initial state court pleading. *Pullman Co. v. Jenkins*, 305 U.S. 534, 538 (1939). There is an escape hatch for defendants if the initial pleading does not disclose removability, but a later paper served by the plaintiff shows removability, at which time the thirty day limit for seeking removal begins to run anew. *Great Northern R. Co. v. Alexander*, 246 U.S. 276, 280-281 (1918). However, even removal based on this exception must, in diversity cases, be effected within one year of the commencement of the state court action. Section 1446(b), second paragraph. Thus, if a case becomes removable by reason of complete diversity after that date, the case must nevertheless remain in state court.

In this case, the initial pleading showed that the action was not removable, because there was incomplete diversity. Petitioner later learned a fact — respondent's partial settlement with Whayne Supply — which petitioner thought made the case removable, and therefore it filed its removal petition within thirty days of learning this fact. On the hypothesis that the case was then removable, but had not been remo-

vable previously, the petition was timely under section 1446(b) because it was filed one day less than a year after the commencement of the state action. It is critical to note, however, as the petitioner now concedes in order to frame the question on which review has been granted, that the case was not in fact removable, because complete diversity did not exist at that time. To the contrary, the case did not become removable based on complete diversity until Whayne Supply was dismissed from the action, which occurred well after the one-year limit on removability.

Finally, section 1447(c) sets forth procedures that plaintiffs who object to removal must follow in order to enforce the right to a remand to state court, and specifies the time within which different removal defects must be acted upon (emphasis added):

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If **at any time** before final judgment **it appears** that the district court **lacks subject matter jurisdiction**, the case **shall** be remanded.

Under this language, procedural defects, such as failure to file within thirty days of receipt of the initial complaint, must be raised within a limited time period. Defects based on lack of subject matter jurisdiction must be acted on either if raised by motion, or if a perspicacious district judge recognizes the problem sua sponte. And, if a jurisdictional flaw "appears," whether by motion or sua sponte, remand is **mandatory**, so long as the defect comes to the district court's attention at any time before final judgment.

In this case, respondent sought remand within the thirty days allowed for motions based on procedural issues, even

though his objection went to jurisdiction. Although the district court rejected respondent's contention that complete diversity was lacking, the court of appeals reversed, holding that jurisdiction was lacking at the time of removal. As petitioner acknowledges, Br. 5, because the Court has denied certiorari regarding this part of the court of appeals' decision, it has become final. Accordingly, the law of the case is that the district court did not actually have jurisdiction when the case was removed from state court.

Respondent was entitled to appeal from that ruling, but not immediately. Under 28 U.S.C. § 1291, appeals may be taken only from final decisions, which a refusal to remand decidedly is not. *Chicago, Rock Is. & Pac. R. Co. v. Stude*, 346 U.S. 574, 578 (1954). Like other interlocutory rulings, denial of remand is merged with the final judgment, and may be raised once the final decision has been issued. *Id.*; *see also Gay v. Ruff*, 292 U.S. 25, 30 (1934).

In order to create an exception to this plain statutory rule, petitioner invokes this Court's decision in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), which established that, when removal has not been challenged until after judgment was entered, the judgment should not be overturned if there was jurisdiction at the time of trial as well as at the time of judgment. In *Grubbs*, GECC did not object when its case was removed to federal court, and first contended that removal was improper after judgment was entered against it. This Court held that, when no objection has been raised below to removal, "the issue . . . on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court," *id.* at 702, and where the posture of the case has changed after removal and the parties have not objected to jurisdiction, it suffices that jurisdiction existed "as of the date of judgment." *Id.* at 704. It would serve no purpose, the Court continued, to require

the judgment winner, who was dragged against his will but without objection from the judgment loser into federal court, to demonstrate the existence of jurisdiction with respect to virtually unrelated claims with which his own claims had been joined while the case was in state court.

There are, it may readily be seen, two crucial differences between this case and *Grubbs*. First, petitioner concedes, in the lengthy footnote 6 on pages 14-15 of its brief, that the removal in *Grubbs* was defective for procedural rather than jurisdictional reasons. That is, complete diversity was available from the outset of the case as a basis for removing the action between a New York corporation and a Texas resident. Although the New York corporation did not remove the case within the requisite thirty days, the United States was subsequently added as a defendant, and it timely removed the claim against it, citing section 1444 as authority for removal. Not only did none of the other parties object to removal, but they all proceeded to try their claims to judgment. However, as petitioner also concedes, the lawsuit could have been removed to federal court when it was filed. The Court held in *Grubbs* only that, where there was jurisdiction as between the original parties to the case at time of judgment, it mattered not that removal on the basis of the claims against the United States was improper, especially where those claims were virtually unrelated to the claims between the original parties that were tried to judgment by consent.

Here, by contrast, there was no proper basis for federal jurisdiction of this case when it began or when it was removed, and it can scarcely be denied that either respondent's claims or Liberty Mutual's subrogation claims against Whayne Supply were related to the claims against petitioner. *Grubbs* cannot, therefore, be invoked as precedent to support a retroactive validation of the removal of this case, in which there was no jurisdiction at the time of filing or removal.

Second, in *Grubbs* nobody had objected to removal, nobody moved to remand, and the lower court never noticed the jurisdictional issue sua sponte. The court never issued an erroneous jurisdictional ruling from which anybody could have appealed. And, with respect to the language of section 1447(c), there was no time at which it could be said that "it appear[ed]" in the district court that there was no jurisdiction. Thus, the language of the statute did not require there, as it does here, that the case be remanded to state court.[4]

This difference also points up a significant equitable distinction between the two cases. The jurisdictional objection here is not based on sour grapes — respondent promptly asked the district court to return the case to state court, and the case was tried in federal court over his objection. Although subject matter jurisdiction cannot be granted by consent of the parties, it would have been unfair in *Grubbs* to overturn a judgment based on an error that the litigant who was later disappointed by the outcome of the litigation never called to the district court's attention. Thus, in *Grubbs*, the Court was presented with the sorry spectacle of a litigant agreeing to proceed in federal court, and willingly taking advantage of the differences between federal and state procedures, and crying sour grapes only after it lost in federal court. By the same token, in both *Baggs v. Martin*, 179 U.S. 206 (1900), and *Mackay v. Uinta Development Co.*, 229 U.S. 173 (1913), on which *Grubbs* relied, parties who removed the case to federal court objected to removal only

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[4] In *Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826 (1989), on which petitioner also relies, the suit was originally filed in federal court, and a jurisdictional defect was ignored in both the district court and the appellate briefs. This Court held that, when the court of appeals noted at argument that a dispensable defendant was not diverse, it could invoke Rule 21, F.R.Civ.P., to dismiss that defendant and so preserve jurisdiction. *Newman-Green* does not involve removal and does not otherwise aid petitioner.

after losing a judgment on the merits, and this Court refused to overturn judgments at their request.

Similarly, in *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951), the majority made clear its discomfort with the fact that a judgment loser, who attacked jurisdiction on appeal, was the one responsible for removing the case to federal court in the first place. *Id.* at 16-17. It nonetheless felt compelled to remand because jurisdiction cannot be created by consent and because at no time, not even at the time of judgment, had there been a proper basis for federal jurisdiction. *Id.* at 16-18. The minority applied the doctrine of estoppel to bar the jurisdictional question from being raised. *Id.* at 20-21.

Petitioner reads *Finn* and *Grubbs* as establishing a broad rule that improper removal can be retroactively validated whenever jurisdiction later becomes appropriate. The fair reading of both cases, however, is that there is a narrow exception to the requirement of jurisdiction at the time of filing and removal, confined solely to the situation where there is **both** jurisdiction at time of judgment **and** express or implicit consent by the judgment loser to removal.

Indeed, adoption of petitioner's contention that removal may be retroactively validated by subsequent events would destroy the carefully crafted Congressional scheme governing both the procedure and timing of removal petitions and remand motions. Thus, for example, under section 1446(b), as amended in 1988, a case may not be removed based on newly established diversity jurisdiction more than one year after the action has been commenced in state court. In this case, the action was commenced in state court on June 22, 1989. Diversity was not complete on June 21, 1990, when the action was removed to federal court eleven months and twenty-nine days after the state court action was commenced, and did not become complete until June 1993 when Liberty

Mutual settled its subrogation claim with Whayne Supply and the latter was formally dismissed from the case. Had petitioner waited until June 1993 to remove this case to federal court, its petition would have been untimely.[5]

And yet, under petitioner's theory, an **improper** removal, undertaken the day before the right to remove expired, may subsequently be validated by developments that establish subject matter jurisdiction. Such a rule would fly in the face of the Congressional determination to limit the time in which jurisdictional changes may be used to effect removal, not to speak of encouraging state court defendants to remove cases improperly in the hope that subsequent developments, possibly coupled with erroneous district court rulings, could enable them to secure a federal court hearing to which they were not entitled.

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[5] Because, under part of the court of appeals' ruling that has become final, it was Liberty Mutual's subrogation claim in respondent's name that barred complete diversity, petitioner's insinuations that respondent deliberately manipulated the timing of the consumation of the settlement of his nonsubrogable claims with Whayne Supply is a complete red herring. Even if those claims against Whayne Supply had been dismissed in June 1990 instead of August 1990, diversity would still not have been complete until June 1993, long after the one-year deadline. In that regard, before the 1988 amendments, conversations about the intent to dismiss non-diverse defendants were held not to trigger the time to remove the remaining controversy. *Gottlieb v. Firestone Steel Prod. Co.*, 524 F. Supp. 1137, 1139 (E.D. Pa. 1981) (citing other cases on this point). This case does not present an occasion to decide whether this rule should change now that proponents of removal may be disadvantaged by the need to wait for the formal dismissal to be effected. *See Smith v. Bally's Holiday*, 843 F. Supp. 1451, 1454-1455 (N.D. Ga. 1994).

Petitioner's amicus curiae, a large group of product liability defendants, openly proclaim that this is their goal. Having obtained in the 1988 removal amendments a specific mechanism for dealing with fictitious defendants and a firm deadline for remand motions, while accepting a limit on the time within which post-commencement changes could become the basis for removal jurisdiction in diversity cases, they simply ask the Court to delete the part of the compromise that they do not like. They urge the Court to adopt a "bright line rule that **no** violation of the removal statute is a proper ground for setting aside the judgment of a federal court where the court has jurisdiction at the time judgment is entered." Br. 2, 5 (emphasis in original). It suffices to say, in response, that the rule that a defendant desirous of removal must follow certain procedures, and meet certain deadlines, is well within Congress' prerogative, and this Court is simply not authorized to strike out part of the legislation by making it unenforceable, on the theory, put so boldly by amicus, that these procedures are worthless "legal ritual." Br. 2.[6]

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[6] Petitioner's proposed rule also makes little sense in light of the 1988 amendment to section 1447(c), whereby procedural objections to removal must be raised within thirty days of removal. At least some procedural flaws in removal papers cannot be cured after the removal petition is filed. *E.g., Jackson v. Allen*, 132 U.S. 27 (1889); *Denton v. Wal-mart Stores*, 733 F. Supp. 340, 341 (M. D. Fla. 1990); *but see Kinney v. Columbia S&L Ass'n*, 191 U.S. 78, 83-84 (1903) (inadequate allegations may be supplemented). And yet under petitioner's approach, although Congress has given plaintiffs who oppose removal a much longer time (that is, until final judgment) to call jurisdictional defects to the Court's attention, and even though a jurisdictional defect is far more serious than a mere flaw in the formalities of seeking removal, the jurisdictional problem can be "cured" but the procedural flaw may not be.

Petitioner argues that affirmance "would toss into the trash heap six years of federal court proceedings," Br. 7, and that reversal is needed to avoid inefficiency in the allocation of judicial and litigation resources. *Id.* 8. Its concern is vastly overstated. Although it is true that, if the case is remanded to state court, there may be another trial, that does not mean that the parties' litigation efforts in federal court will have come entirely to naught. Their legal research and discovery efforts, not to speak of the trial transcripts, will be available for use in the state court proceedings, and presumably the case can now be brought to trial promptly or, possibly, settled.

Moreover, to the extent that a new trial is needed, that is the consequence of **any** reversal subsequent to trial. Any inefficiency that is involved may be laid squarely at the feet of petitioner, which made its own bed by removing the case prematurely, in anticipation of the eventual dismissal of Whayne Supply, but with knowledge that Whayne Supply had not yet been dismissed and that, if it waited even two more days to file, the notice of removal would be untimely.

Indeed, knowledge that improper removal may lead to the loss of an otherwise valid judgment is needed to discourage defendants like petitioner from filing premature petitions for removal. If this Court eliminates that disincentive, defendants will have every reason to remove to federal court, in the hope that some subsequent developments, such as the eventual dismissal of nondiverse defendants, will permit that case to be kept in federal court and thus immunize an initial erroneous removal ruling from challenge on appeal.

Petitioner also suggests, Br. 7, 21, that respondent was in no way prejudiced by removal to federal court. Aside from its irrelevance, this assertion is simply not correct. There are numerous practical differences between proceedings in the Kentucky state courts and federal court, each of

which made it less advantageous for respondent to be in federal court, and which, indeed, provide the reason why respondent objected to removal and moved to remand the case to state court.

First, if the case had proceeded to trial in state court, the jury pool would have been confined to the rural county where respondent lives and where the accident occurred, instead of being drawn from the entire division of the federal district in which the case proceeded in federal court. The jury would thus not have included the professionals who sat on the federal court jury and, who, respondent believes, were less sympathetic to his case than a local jury would have been. Moreover, in federal court, a unanimous jury verdict is required, while in state court a plaintiff can prevail by a majority of 9-3, *see* K.R.S. § 29A.280, which respondent would have preferred.

There is also a major difference between the federal and state rules of evidence. At trial, respondent sought to show that, after the bulldozer at issue here was manufactured, changes were made to the design that caused respondent's injuries, to bolster his contention that the machine was defective. Such evidence is allowed by Kentucky law, *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991), but the circuits disagree whether Rule 407 of the Federal Rules of Evidence bars evidence of subequent remedial measures in product liability as well as in negligence cases. *Compare Burke v. Deere & Co.*, 6 F.3d 497, 506 (8th Cir. 1993) *with Grenada Steel Indus. v. Alabama Oxygen Co.*, 695 F.2d 883, 886-888 (5th Cir. 1983). Pursuant to the general rule that the Federal Rules govern the admissibility of evidence in diversity cases, *e.g.*, *id.*, 665 F.2d at 885; *McInnis v. AMF*, 765 F.2d 240, 244-245 (1st Cir. 1985), the district judge followed Sixth Circuit precedent that Rule 407 does apply. *Hall v. American S.S. Co.*, 688 F.2d 1062, 1067 (1982); Trial Tr., 11/18/93, at 50. Respondent would not have suffered this very substantial disadvantage had the case not been erroneously removed in the first place.[7]

In noting these differences, respondent's point is not that what happened in federal court was fundamentally unfair or even reversible error under federal law (although he so argued below). But the fact remains that the federal and state courts and legislatures have made any number of different choices about the way in which judicial proceedings ought to be conducted, each of which is, on its own merits, entirely fair and reasonable. And the persons who select (or, in Kentucky, elect) the judges who exercise substantial discretion in the conduct of trials may have very different priorities regarding the characteristics that they seek out in prospective judges. Again, each set of choices is entirely just and reasonable, but they may produce very different results in the litigation and trial of cases.

Indeed, concern about local favoritism provides one of the biggest reasons why national defendants like petitioner and its amicus want to get out of state court and into federal court, and why, therefore, they base their briefs in cases like this on their sacred "right to remove a case." Pet'r Br. 18; Motion for Leave to File as Amicus Curiae, at ii. How petitioner can make that argument and then contend that it really makes no difference whether a trial is held in state or federal court, is baffling to say the least.

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[7] Trial in federal court also prevented respondent from using his allegations that petitioner had concealed evidence as a basis for a new tort claim of spoliation of evidence. Kentucky did not recognize this tort until 1995, *Reed v. Westinghouse Elec. Corp.*, No. 93-CA-2125-MR (Ky. App., March 10, 1995), *pub. withdrawn pend. rvw.*, No. 95-SC-549. Federal courts do not allow diversity plaintiffs to advocate untested legal theories of state law. *E.g.*, *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 424 (D.C. Cir. 1988).

And yet the reason why federal courts are of limited jurisdiction, and the reason why removal is strictly limited by statute and court decision, is that Congress and this Court have long recognized that both the crafting of litigation procedures and the selection of adjudicators to decide disputes involving their citizens represent key aspects of state sovereignty. It is, therefore, not a substantial objection to the reversal of a judgment that has been obtained by an erroneous removal that the federal judgment was not produced by rules or procedures that are inherently unfair.

There is also a very practical reason for rejecting petitioner's expressions of concern about avoiding repetition of litigation efforts if a fully-tried case can be relitigated in state court based on an early error with respect to removal jurisdiction. If a federal judgment loser does not think that there are substantial differences between state and federal procedures, he is scarcely likely to invest the time and resources needed to mount a second multi-day trial in state court. It makes little sense to argue that, in most cases where removal was improper but judgment was reached in federal court, there will be further proceedings in state court. The Court may rely upon the practicalities of litigation to prevent further proceedings in many such cases. For this reason as well, petitioner's argument based on the inefficiency of allowing retrial should be rejected.

Finally, it is doubtful that judicial efficiency is a sound basis for construing the removal statutes, which reflect a series of carefully crafted compromises between concerns of state sovereignty, which have led both Congress and this Court to severely restrict opportunities for removal of cases from the state courts, and a desire to allow certain groups of defendants to remove cases that were, at the time of removal, within federal jurisdiction. Such inefficiency, and a lack of prejudice, is surely entailed when a federal appeals court reverses a denial of remand that was based on procedural objections to the removal petition. It is hard to imagine how a plaintiff is "prejudiced" if, for example, a defendant removes within 31 instead of 30 days after receipt of the complaint. Moreover, as discussed above, adoption of petitioner's proposed rule allowing retroactive cure of jurisdictional flaws would introduce its own set of inefficiencies and paradoxes into the Congressional removal scheme, such as by encouraging defendants to file unsound notices of removal within the one-year limitations period in the hope that subsequent developments will validate the removal.

In summary, then, petitioner's contention that removal without jurisdiction, effected the day before the expiration of the one-year time limit for removal of diversity cases, may be validated by developments subsequent to removal that create complete diversity, even in the face of a clear objection from the plaintiff, is contrary to the language of the removal statutes, to this Court's longstanding construction of those statutes, and to the requirements of state sovereignty that undergird the limited availability of removal. Because jurisdiction was lacking at the time of removal, and respondent objected at that time, the decision below should be affirmed.

II. Because Title 28 and the Federal Rules Spell Out the Procedures and Time Limits that Plaintiffs Must Follow to Object to Removal Based on Lack of Jurisdiction, the Court Should Neither Legislate an Additional Hurdle for Litigants to Clear, Nor Impose on Appellate Courts the Burden of Entertaining Interlocutory Appeals Whenever a Case Is Removed Over the Plaintiff's Objection.

Petitioner also argues that respondent waived his objection to removal based on lack of jurisdiction at that time when he did not pursue the issue by seeking leave for an interlocutory appeal under 28 U.S.C. § 1292(b). From the perspective of a case in which judgment has been entered and

the Court faces the prospect of a retrial, petitioner's suggestion that "needless inefficiency" could have been avoided had respondent obtained interlocutory review of the denial of his motion to remand in 1990 has a superficial appeal.

There are, however, two compelling reasons why this suggestion should be rejected. First, the removal statutes and the Federal Rules of Civil Procedure spell out both the procedures that a plaintiff who opposes removal based on lack of jurisdiction must follow, and the times within which those actions must be taken in order to preserve the objection. Respondent complied with these requirements, and the Court should not legislate additional hurdles. Second, although requiring interlocutory appeals might reduce the small number of cases in which judgments are overturned based on erroneous decisions permitting removal, requiring such appeals in every case would make mandatory a form of appeal that is currently discretionary and highly disfavored, and would vastly increase the number of such appeals (including necessary pre-appeal rulings on permission to appeal), further burdening the already heavy dockets of the courts of appeals.

A. The first reason why petitioner's proposed waiver rule should be rejected is that it is contrary both to the removal statutes and to the Federal Rules of Civil Procedure. In effect, petitioner argues that, in addition to taking any other steps, a plaintiff who wishes to preserve an objection to removal must first seek a certification from the district judge that permits the order to be appealed, and then apply to the Court of Appeals for permission to appeal within ten days of the entry of the district court's order.

By contrast, in the 1988 amendments to section 1447, Congress specified the means by which objections to removal must be brought to the attention of the courts, and the times such objections must be raised, implicitly determining when each kind of objection would be waived if not asserted. Section 1447(c) specifies that objections based on removal procedures "must be made within 30 days after the filing of the notice of removal," implicitly providing that such objections are waived if not made within that time. On the other hand, the lack of subject matter jurisdiction requires a remand so long as "it appears" "at any time before final judgment." This provision notifies litigants that if the issue does not come to the district court's attention before judgment is entered, it may be waived, and implicitly assures them that, so long as they raise the issue before judgment, the issue has **not** been waived.

This statutory provision is reinforced by Rule 12(h) of the Federal Rules of Civil Procedure, which sets forth the means and deadlines by which various defenses must be raised. The 1966 Advisory Committee Notes make clear that, in conjunction with Rule 12(g), one function of these provisions is to specify the times and ways by which the itemized defenses are waived if not made. Under this rule, many defenses must be raised, on pain of waiver, within the time for filing an answer or motion under Rule 12, Rule 12(h)(1); almost every other defense may be raised throughout the proceeding under Rule 12(h)(2); and even after trial on the merits, the defense of lack of subject matter jurisdiction is not waived so long as it is brought to the attention of the court, "by suggestion of the parties or otherwise." Rule 12(h)(3). Yet petitioner makes no bones about the fact that its argument for a mandatory request for certification is tantamount to an additional requirement for the preservation of the defense of lack of subject matter jurisdiction.

This Court has been at pains to enforce the Federal Rules of Civil Procedure as written. *Leatherman v. Tarrant Cy. Narcotics Unit*, 113 S. Ct. 1160, 1163 (1993); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988). Even if a change in procedure is desirable — and respondent shows below that requiring a section 1292(b) appeal is a very bad

idea — the Court has refused to adopt such new procedures through adjudication, preferring to follow the time-honored procedure of consideration by the Rules Committees with appropriate public notice and opportunity for comment, adoption by the Court under 28 U.S.C. § 2072, and ultimately review by Congress as the Rules Enabling Act provides.

Use of that procedure is particularly appropriate in light of recent amendments to 28 U.S.C. §§ 1292 and 2072 that not only authorize, but indeed encourage, this Court to adopt rules governing the finality of district court orders for purposes of appellate review. As respondent demonstrates in the next section of this brief, at 28-30, petitioner's argument, although clothed in the raiment of discretionary appeals under section 1292(b), would effectively transform rulings rejecting remand from interlocutory orders into final orders from which an appeal must be sought if they are to be appealed at all, before the remainder of the case proceeds. But, as the Court stated only recently in *Swint v. Chambers Cy. Com'n*, 115 S. Ct. 1203, 1211 (1995), "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." Thus, because no statute or Rule makes the rejection of removal rulings final, the right to appeal such a ruling after the final judgment in the case may not be denied on the ground that it should have been appealed when entered.

B. Petitioner's proposal that failure to pursue an appeal under section 1292(b) constitutes a waiver of the right to appeal should also be rejected because it would wholly transform such appeals from discretionary proceedings, which are used only in the exceptional case, and which most courts of appeals strongly discourage, into a routine and indeed mandatory mechanism for the litigation of removal questions on appeal. Although petitioner can cite some appellate authority to support its position, its petition acknowledged, at 17, that

the majority rule is to the contrary, and indeed this Court has not hesitated in the past to entertain appeals from final judgments pertaining to removability without the slightest hint that there had been an interlocutory appeal in the interim, let alone that one was required. *E.g. Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). In *Grubbs* itself, the Court decided whether removability had to be determined as of removal or as of judgment in the favor of petitioner Grubbs, even though, under petitioner's theory here, GECC had waived the issue by not pursuing an interlocutory appeal from the assumption of jurisdiction.[8]

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[8] Cases like *Sheeran v. General Elec. Co.*, 593 F.2d 93, 97 (9th Cir. 1979), *Gould v. Mutual Ins. Co. of New York*, 790 F.2d 769, 773-774 (9th Cir. 1986), and *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 341-342 (3d Cir. 1974), *cert. denied with three Justices dissenting*, 421 U.S. 937 (1975), present a different issue. In those cases, unlike here, the appeal in which removal was challenged was not the first because there had been a prior appeal from an interlocutory order or, in *Gould*, from a final judgment, in which the jurisdictional issue had not been raised. The propriety of jurisdiction may be considered in the course of interlocutory appeals under section 1292(a), *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940), and most courts apply the same principle to allow removal issues to be considered as well. *E.g., Humphrey v. Sequentia*, 58 F.3d 1238, 1240 n.2 (8th Cir. 1995). In that situation, it is arguable that issues of jurisdiction, because they must be addressed before consideration of the merits, are implicitly decided on the first appeal, and thus become law of the case. *See Little Earth of United Tribes v. HUD*, 807 F.2d 1433, 1438 (8th Cir. 1986) (law of case applies to issues decided only implicitly). Moreover, if there has been a previous appeal, requiring removal to be contested in that first appeal does not implicate the policies pertaining to discretionary appeals under section 1292(b), as this case does. However, the Ninth Circuit applied *Sheeran* and *Gould* to cases where there had been **no** prior appeal, and the Fourth Circuit followed suit, without noting the differences between the two kinds of cases.

This long-standing practice is well supported by reason and precedent. It follows, indeed, from the strong presumption that all trial court errors should be corrected by "a single appeal, to be deferred until final judgment has been entered." *Digital Equipment Corp. v. Desktop Direct*, 114 S. Ct. 1992, 1996 (1994). This presumption fully applies to claims that the case is being tried in the wrong forum. *Lauro Lines v. Chasser*, 490 U.S. 495, 500-501 (1989).

After all, although it may seem wasteful to retry a case if appeal is postponed until after judgment, it would be even more wasteful if every denial of a motion to remand not only may be the subject of an interlocutory appeal, but **must** be appealed in order to preserve the removal issue for review. Courts routinely warn that, to avoid piecemeal appeals, section 1292(b) may only be invoked in truly "exceptional" circumstances. *E.g.*, *Fisons Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972), *quoted with approval*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Most lower courts allow section 1292(b) appeals only if needed to avoid unusually protracted and expensive litigation, *e.g.*, *In Re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), *mandamus considered on merits*, 688 F.2d 1297, *aff'd for lack of quorum*, 459 U.S. 1191 (1983), as indeed, the Judicial Conference contemplated when it promoted section 1292(b) in Congress. *See* 1958 U.S. Code Cong. & Admin. News 5260-5261. *Contra, Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 702-703 (5th Cir. 1961). Indeed, the Sixth Circuit has specifically instructed that "[t]his statute was not intended to authorize interlocutory appeals in ordinary suits for personal injuries or wrongful death that can be tried and disposed of on their merits in a few days." *Kraus v. Board of Cy. Rd. Com'rs*, 364 F.2d 919, 922 (6th Cir. 1966), *recited in Wagner v. Burlington Indus.*, 423 F.2d 1319, 1322 n.5 (6th Cir. 1970). In light of this authority from the circuit where this case arose, petitioner's denunciation of respondent for failing to seek interlocutory certification that might have avoided a six-day trial, Br. 7, rings more than a little hollow.

Apart from the fact that section 1292(b) appeals may not be available in most removed cases under the Sixth Circuit's rule because their trials are not "big" enough to warrant exception to the general rule against interlocutory appeals, section 1292(b) contains several procedural and substantive requirements that impede use of this mechanism to appeal orders denying remand to state court. The district court must enter an order both stating its opinion that each of the three requirements is met, and explaining why. *Isra Fruit v. Agrexco Agr. Export Co.*, 804 F.2d 24, 25 (2d Cir. 1986). Thus, it must find not only that "an immediate appeal may materially advance the ultimate termination of the litigation," but also that the case "involves a controlling question of law" and that "there is substantial ground for difference of opinion" on that question of law. *White v. Nix*, 43 F.3d 374, 376-378 (8th Cir. 1994) (criteria not met just because there was little authority on point). Interlocutory appeal is considered undesirable where the legal issue is so intertwined with the specific facts of the case that it is better to pursue the matter along with the rest of the case after the final decision. *Spurlin v. General Motors Corp.*, 426 F.2d 294 (5th Cir. 1970). Some courts refuse certification unless resolution of the legal issue would affect a wide spectrum of cases. *E.g.*, *FDIC v. First Nat'l Bank of Waukesha*, 604 F. Supp. 616, 620 (E.D. Wis. 1985); *Graves v. First Nat'l Bank of Ga.*, 491 F. Supp. 280, 282 (D.S.C. 1980); *see also Parcel Tankers v. Formosa Plastics Corp.*, 764 F.2d 1153, 1155 (5th Cir. 1985) (revoking certification when it became clear that legal question was no longer of general importance); *but see Klinghoffer v. SNC Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) (treating precedential importance of legal questions as just one factor that may support an immediate appeal).

Moreover, if the district court fails to certify its ruling for appeal, the matter is not reviewable in the court of appeals. *Leasco Data Processing Equip Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972); *see also Swint v. Chambers Cy. Com'n*, 115 S. Ct. 1203, 1210 (1995) (section 1292(b) **requires** a two-tiered system in which **both** district and appellate courts must approve the appeal). But if the district court does certify the appeal, the court of appeals may still exercise unreviewable discretion to refuse to consider the appeal for any reason, including the fact that its dockets are already too crowded. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). In exercising that discretion, the courts of appeals routinely take into account not only the impact that immediate review may have on the case before it, but also the long-range impact that allowing the appeal may have in breaking down the general rule against piecemeal appeals. *E.g., Link v. Mercedes-Benz of N. Am.*, 550 F.2d 860, 862-863 (3d Cir. 1977) (en banc).

For these reasons, it seems highly doubtful that this appeal would have been certifiable. As the appellate briefs make clear, the "legal" issues here were intertwined with the hotly-disputed particular facts of the case and some peculiarities of the structure imposed by Kentucky law on product liability actions of this sort. Petitioner could find only two district court cases to cite on its side of the issue, and it does not appear that the case involved questions on which there is a substantial difference of opinion. Indeed, the court of appeals directed that its opinion not be published, signaling its views that the jurisdictional issue was not of general interest, and this Court also concluded that the jurisdictional issue did not merit review.

It is even questionable whether certification of removal issues ordinarily will materially advance the termination of the litigation. It is true that, in the event a denial of remand is overturned, the case will be remanded to state court, but

that scarcely means that the litigation itself will be over. Even if the case proceeds to trial in federal court and thus must be remanded to state court after the appeals court decides that removal was improper, it is also quite possible, and indeed likely, especially in personal injury cases where money is the only issue, that the case will be settled or otherwise resolved short of trial in a way that will obviate the need for substantial proceedings in state court. Other cases will reach the court of appeals on some interlocutory issue (such as preliminary injunctions) or even a final decision short of trial (such as summary judgment), in which case the possibility of a section 1292(b) appeal is not needed to avoid the expenditure of trial resources.[9]

Respondent does not mean to suggest that removal cases are never appropriate for certification under section 1292(b), but only that it would be a mistake to proceed on the assumption that they are always certifiable. Given all of the obstacles that stand in the way of certification in such cases, it would be odd indeed to insist that certification be used as a gate keeper for appellate review of removal decisions after final judgment.

Most significant, if petitioner's rule is adopted, certification of removal cases will be transformed from the exceptional and highly permissive procedure that was contemplated by Congress in 1958, and that has been followed in the lower courts to date, into a mandatory procedure to be followed by

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[9] Because this Court has yet to address the standards that the lower courts should apply in deciding whether to certify and permit appeals under section 1292(b), it seems particularly unfair to penalize respondent for having failed to anticipate a reversal of the Sixth Circuit's reluctance to allow such appeals in personal injury cases like his. Indeed, it seems backwards for this Court to address for the first time on this petition the factors warranting such appeals, instead of in a case that directly raises that issue.

any plaintiff who objects to removal. Requests for certification may or may not lead to actual consideration on appeal. Yet in every removal case the district court would be faced with requests for certification, and whenever that was granted, the court of appeals would have to consider the question, adding considerably to appellate dockets that are already too large. Such consideration must occur not only on the merits, but at the permission to appeal stage, because the appeal cannot proceed absent an express order by a preliminary panel. And yet, as noted above, at 32, the crowding of appellate dockets has been accepted as a reason to deny permissive appeals under section 1292(b).

Moreover, petitioner's rule will require the litigation of many appellate cases on removal that would **never** have been before the courts of appeals if raising the issue after final judgment were sufficient, because many cases would likely have been settled, or otherwise disposed of on other grounds that would not have left the loser with the expectation that the outcome would have been different had the case been decided in state court. Indeed, the possibility that erroneous rulings may never have to be considered on appeal is one of the foundations of the strong presumption against piecemeal appeals. *Johnson v. Jones*, 115 S. Ct. 2151, 2154 (1995).

In this regard, it should be noted that although petitioner was careful to frame its question presented in narrow terms, concerning only whether failure to raise a jurisdictional issue under section 1292(b) waives that issue, there is no principled reason to confine the rule to jurisdictional cases, and indeed logic would compel the application of the rule to all removal cases. After all, if the case must ultimately be sent back to state court because removing defendants committed some lapse in removal procedure, such as omitting a necessary recitation in the notice of removal, or filing it too late, it is just as important to learn that in advance of trial as it is to learn of the need to remand for lack of jurisdiction

Indeed, because procedural issues are more easily waived under section 1447(c) and Rule 12(h) of the Federal Rules of Civil Procedure, *supra* at 26-27, it seems even more in keeping with the general policies governing the construction of the removal statutes to impose a rule of waiver by failure to seek immediate appeal in such cases than in cases involving jurisdiction to remove.

Admittedly, petitioner has not squarely addressed the question of whether the removal issue is preserved for appeal if the opponent of removal seeks certification but is denied that opportunity. Is the mere effort to appeal a denial of remand sufficient to preserve the issue, or does the failure of either the district court or court of appeals to grant appeal doom the objection to removal? In either case, the effort becomes mandatory. Moreover, if the mere effort does not preserve the issue, then district courts and courts of appeals will be under heavy pressure to certify and grant permission, respectively, for appeals of this nature in every case. Indeed, a rule giving courts broad discretion not to consider appeals pertaining to removal, such as for reasons of docket congestion, seems contrary to the cardinal principle that removal is disfavored and should be denied in close cases. *Cf. Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976) (removal may not be denied for reasons of docket congestion).

In the Ninth Circuit, only the effort is needed to preserve the issue, even if permission to appeal is denied. *O'Halloran v. University of Washington*, 856 F.2d 1375, 1378 and n.1 (1988); *cf. Able v. Upjohn Co.*, 829 F.2d 1330, 1334 (4th Cir. 1987) (if appeal is denied but propriety of removal was doubtful, later appeal would be examined "in light of that fact"). Because most appeals will not be allowed, the requirement becomes merely an empty ritual, that will require the litigants to file more paper, thereby giving at least the district court and perhaps the court of appeals one

extra matter to consider (or two, if the case would have gone away before judgment), and little more.

In summary, although from the perspective of a case where remand has been ordered after trial, petitioner's rule requiring interlocutory appeal may seem attractive, adoption of that rule or anything comparable would have deleterious effects on other important jurisdictional and removal policies, as well as being contrary to the letter and the spirit of the statutes and rules. Accordingly, respondent should not be held to have waived his objections to removal by his failure to seek or obtain an interlocutory appeal under 28 U.S.C. § 1292(b).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

Leonard J. Stayton
(*Counsel of Record*)

P. O. Box 1386
Inez, Kentucky 41224
(606) 298-5117

Paul Alan Levy
Alan B. Morrison

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CATERPILLAR INC.,

Petitioner,

v.

JAMES DAVID LEWIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

JAMES B. BUDA
Caterpillar Inc.
100 N.E. Adams St.
Peoria, IL 61629-7310

WILLIAM F. MAREADY
Robinson Maready Lawing & Comerford, L.L.P.
380 Knollwood St.
Suite 300
Winston-Salem, NC 27103

KENNETH S. GELLER*
MICHAEL R. FEAGLEY
JOHN E. MUENCH
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

LESLIE W. MORRIS II
Stoll, Keenon & Park, LLP
201 E. Main St.
Suite 1000
Lexington, KY 40507

**Counsel of Record*

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REPLY BRIEF FOR THE PETITIONER

Respondent's brief reveals two crucial areas of common ground between the parties in this case. First, Lewis now agrees with Caterpillar that the district court had jurisdiction to decide the case. He has totally abandoned the sole argument that he made below and in his opposition to the petition for certiorari, and the sole argument endorsed by the court of appeals — that the district court lacked jurisdiction at the time of judgment. Instead, implicitly conceding that there is no *jurisdictional* defect requiring remand of the case to state court, Lewis now contends, for the first time, that the federal removal statute independently grants plaintiffs an absolute *statutory* right to a remand whenever removal was improper. Lewis acknowledges (at Br. 7 n.3), however, that he did not make this argument below or in his opposition to the petition. We explained in our opening brief (at 13 & n.4) that this failure forecloses Lewis from making the argument now; Lewis cannot explain why that rule of waiver should not apply here.[1]

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[1] Lewis argues that if the Court is unwilling to entertain his new argument it should dismiss the petition as improvidently granted "because there would then remain nothing to litigate." Resp. Br. 7 n.3. This contention is sophistry. The petition for certiorari squarely posed the sole question decided by the court of appeals: whether judgment must be vacated "due to an alleged lack of diversity of citizenship at the time of the removal when the nondiverse party was dismissed from the action prior to trial." Pet. i. Lewis responded in opposing the petition (as he had in the court of appeals) that remand was necessary because a district court lacks *jurisdiction* to decide a case whenever diversity was not complete at the time of removal, even if complete diversity attached prior to trial. See, *e.g.*, Br. in Opp. 6 ("there is a lack of subject matter jurisdiction"). In reliance on this argument, much of Caterpillar's opening brief is devoted to establishing that the district court had jurisdiction to decide the case. Lewis's present recognition that his jurisdictional argument lacks merit does not entitle him to advance a wholly new statutory argument for the first time in this Court — and his abandonment of the contention he relied

(continued...)

Second, Lewis evidently recognizes the central reality of this case: that his approach would lead to an enormous waste of judicial resources, as years of proceedings and a six-day trial are thrown onto the trash heap. Thus, candor forces Lewis to acknowledge that Caterpillar's approach — which would avoid this huge inefficiency — is "superficially appealing," "desirable," and "attractive." Resp. Br. 1, 36. With this as background, the issue here is presented starkly: whether anything in the removal statute requires the Court to set aside the district court's judgment and remand the case for a new trial, even though Lewis (by hypothesis) received a fair trial[2] before a competent court that had jurisdiction to decide the case.

Nothing in the removal statutes addresses that question directly. But the answer nevertheless is plain. The structure of the removal provisions indicates clearly that Congress intended to preclude unnecessary relitigation. This Court's decisions in the area have eschewed a "hypertechnalism" that would defeat the imperatives of efficiency, economy, and finality. And Lewis simply cannot explain why he should get a new trial when the jurisdictional defect of which he complains was cured years ago. He accordingly cannot mount a persuasive defense of the judgment below.

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[1](...continued)
upon below surely does not entitle him to dismissal of the writ as improvidently granted. Moreover, as Lewis himself recognizes (at Resp. Br. 7 n.3), his contention that Caterpillar did not raise its current argument prior to the rehearing stage in the court of appeals "may be deemed waived" because it was not presented in the brief in opposition. Sup. Ct. R. 15.2.

[2] We do not contend, as Lewis asserts (Resp. Br. 6 n.2), that he "had no objections to the conduct of the federal court proceeding." But his argument here does not turn on those objections; his rule would require the Court to set aside the results of a concededly error-free trial. If the Court reverses the court of appeals' judgment, Lewis's objections to the conduct of his trial may be addressed by the court of appeals on remand.

1. Lewis's principal contention is that a remand is compelled by the language of 28 U.S.C. § 1447(c), which provides in relevant part that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Focusing on the word "shall," Lewis insists that "remand is **mandatory**" when jurisdiction did not exist at the time of removal. Resp. Br. 14 (boldface in original). But this argument rests on a plain misreading of the statute. Section 1447(c) states the black letter rule that a federal court cannot entertain a claim when it "*lacks* subject matter jurisdiction" (emphasis added); in such circumstances, the statute provides that a removed case must be remanded to state court. Here, however, the district court concededly *did not* lack jurisdiction at the time of trial and judgment, and this Court *does not* lack jurisdiction now. In insisting upon a remand, Lewis reads the statute as though it says that cases must be remanded when the district court "*lacked* jurisdiction *at the time of removal*." But that is not what the statute says, and its actual language does him no good at all.

Lewis also is wrong in his reliance on Section 1446(b), which provides that "a case may not be removed on the basis of [diversity of citizenship] more than 1 year after commencement of the action." See Resp. Br. 18-19. This case *was* removed within one year of the initiation of suit. Of course, we assume for purposes of this argument that the removal at that time was wrongful. But Section 1446(b) simply does not speak to that situation.

In fact, the history of the provision — which Lewis does not address — demonstrates that respondent draws precisely the wrong conclusion from Section 1446(b). The 1988 amendment to the provision, which created the one-year limit on diversity removals upon which Lewis relies, did so "as a means of reducing the opportunity for removal after substantial progress has been made in state court." H.R. REP. 100-889, 100th Cong., 2d Sess. 72 (1988). Congress explained:

> The amendment addresses problems that arise from a change of parties as an action progresses toward trial in state court. The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction. Under [unamended] section 1446(b), removal is possible whenever this event occurs, so long as the change of parties was voluntary as to the plaintiff. * * * *Removal late in the proceedings may result in substantial delay and disruption.*

Ibid. (emphasis added). The amendment creating the one-year limit thus was intended to prevent the disruption of proceedings that have progressed significantly. Here, of course, it is *Lewis's* approach that would frustrate this purpose by causing obvious delay and disruption of proceedings that are substantially *complete*.

2. The 1988 amendment of Section 1446(b) is of a piece with other removal provisions in a crucial respect: as we explained in our opening brief (at 15-17), Congress crafted the removal statutes to encourage economy and limit delay, thus aiding "the prompt and efficient resolution of controversies based on state law." *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 353 (1988). Lewis makes no response to this argument.

Instead, he offers the boilerplate observation that federal jurisdiction is narrowly construed so as to "limit[] the ability of state court defendants to impinge on state sovereignty." Resp. Br. 12; see *id.* at 23-25. But this hoary chestnut does Lewis no good here; whether or not federal jurisdiction is construed narrowly as a general matter, the existence of federal jurisdiction in this case is conceded. Indeed, we explained in our opening brief (at 18) that where complete diversity exists (as it did here at the time of trial) federal court is the presumptively better forum for the resolution of the case. Again, Lewis does not answer this point. To the contrary, his brief can be read to suggest that he seeks a new

trial in state court because he may there benefit from "local favoritism." See Resp. Br. 22-23.

In any event, the Court repeatedly has refused to remand removed cases to state court when doing so would disrupt ongoing or substantially completed proceedings. See, *e.g.*, *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699 (1972); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938). Its decisions find support not only in the structure of the removal statute, but also in a broader principle: that "'some consideration must be given to practicalities.'" *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 837 (1989) (citation omitted).[3] And here, those practicalities preclude a remand.

That principle applies with particular force here because the district court's error did not involve any independent policy of the removal statute; instead, the district court made a mistake in its application of the jurisdictional rule set out in 28 U.S.C. § 1332. Yet as we explained in our opening brief, and as Lewis now evidently recognizes, Section 1332 does *not* require dismissal of the federal suit so long as an error of this sort is cured. That being so, when the requirement of the removal statute at issue (that there be jurisdiction in the district court) merely mirrors the requirement of the jurisdictional statute itself, it would be perverse if the cure were sufficient for jurisdictional purposes but not for statutory removal purposes.

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[3] Lewis insists (Resp. Br. 17 n.4) that *Newman-Green* has no bearing here because it did not involve removal. But *Newman-Green* speaks directly to the policy invoked by respondent. In that case, as in this one, federal jurisdiction did not exist at the time the case entered federal court. Indeed, in *Newman-Green* jurisdiction did not exist even at the time the case was tried. But this Court did not find that principles of federalism or comity required dismissal of the suit; instead, the Court concluded that it would avoid a "waste of time and resources" by allowing the case to remain in federal court once the jurisdictional defect was cured. 490 U.S. at 838.

3. Lewis nevertheless insists that "judicial efficiency" is not "a sound basis for construing the removal statutes" and that a showing of "prejudice" is not necessary for a plaintiff in his circumstances to prevail on appeal. Resp. Br. 24-25. In making this argument, however, he offers no response at all to the observation in our opening brief (at 14-15, 18-19) that harmless error rules apply in this area. Nor does he contend that he was prejudiced in any way by the fact that diversity did not become complete until some time after removal. Cf. *Newman-Green*, 490 U.S. at 838. Nor, apart from his insubstantial statutory argument, does he even attempt to explain why an error that *has been cured* should lead to a remand. These failures are unsurprising, for Lewis's premise is fundamentally wrong: the Court has recognized that the removal statutes *are* designed to promote "the values of economy, convenience, fairness, and comity." *Carnegie-Mellon University*, 484 U.S. at 353.

Lewis's one attempt to demonstrate that his approach will further those values is simply silly. He asserts that, if the judgment below is reversed, "defendants will have every reason to remove to federal court, in the hope that some subsequent developments, such as the eventual dismissal of nondiverse defendants, will permit that case to be kept in federal court and thus immunize an initial erroneous removal ruling from challenge on appeal." Resp. Br. 21; see *id.* at 19. But it hardly can be likely that defendants will knowingly remove a case in which federal diversity jurisdiction is lacking (risking sanctions and irritating the trial court), in hopes that the district court will decide the removal question incorrectly *and* that diversity later will come about — with the knowledge that if the district court commits this invited error and diversity does not become complete, the judgment will be vacated on appeal and they will face trial in state court after all. The Court should not premise its decision on the prospect that litigants will act on the basis of this Rube Goldberg chain of contingencies.

4. Caterpillar's position here draws substantial support from *Grubbs*. There, a case was improperly removed to federal court, where the suit was tried to judgment. Nonetheless, this Court held that the case should not be remanded, notwithstanding the improper removal, because "whether or not the case was properly removed, the District Court did have jurisdiction of the parties at the time it entered judgment." 405 U.S. at 700. *Grubbs* therefore inarguably stands for the proposition that removal errors do not necessarily require a remand.

Lewis offers two grounds on which to distinguish *Grubbs*. The first, however, is wrong as a factual matter. He asserts that Caterpillar "concedes [that] the lawsuit [in *Grubbs*] could have been removed to federal court when it was filed." Resp. Br. 16. In fact, that is not so. As we explained in our opening brief (at 14-15 n.6), there was *no* statutory basis on which the case could have been removed. *Grubbs* involved a suit brought in state court by an out-of-state plaintiff against an in-state defendant; while the parties were diverse, removal on diversity grounds was unavailable because the defendant was a resident of the forum state. See 28 U.S.C. § 1441(b). Accordingly, in *Grubbs*, as in this case, the suit was unremovable at the time it entered federal court.

Second, Lewis insists that the principle of *Grubbs* applies only when there was "express or implicit consent by the judgment loser to removal." Resp. Br. 18. But as we also explained in our opening brief (at 15 n.6), it made sense in *Grubbs* for the Court to observe that the case had been removed without objection; there, the removal error — the mistaken invocation of 28 U.S.C. § 1444 by the United States, a third-party defendant — never had been corrected. Here, of course, the error *was* cured after removal and the ground for Lewis's objection accordingly was rendered nugatory.

5. Finally, Lewis misunderstands our argument when he asserts that we would require plaintiffs to seek certification

for interlocutory appeal under 28 U.S.C. § 1292(b) as a prerequisite "for the preservation of the defense of lack of subject matter jurisdiction." Resp. Br. 27; see *id.* at 25-36. Our point is that Lewis *could have* sought certification, which has been granted on removal questions in the Sixth Circuit. Having failed to do so, we continued, Lewis effectively forfeited his right to pursue the issue because complete diversity attached prior to his appeal after judgment. See Pet. Br. 20. Of course, had diversity never become complete, Lewis would have been free to raise his argument on appeal after judgment (and, indeed, the court of appeals would have been required to raise the issue on its own motion had Lewis failed to do so). But diversity did become complete, and Lewis's claim accordingly has been rendered moot.

In sum, Lewis offers no plausible basis for upholding the decision of the court of appeals. He has not defended the Sixth Circuit's jurisdictional rationale. His alternative statutory argument both has been waived and is insubstantial. And he cannot offer any plausible justification for a rule that requires a new trial when the error about which he complains was cured long ago. In these circumstances, Lewis's defense of the Sixth Circuit's hypertechnical and counterintuitive rule should be rejected.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JAMES B. BUDA
Caterpillar Inc.
100 N.E. Adams St.
Peoria, IL 61629-7310

WILLIAM F. MAREADY
Robinson Maready Lawing
& Comerford, L.L.P.
380 Knollwood St.
Suite 300
Winston-Salem, NC 27103

KENNETH S. GELLER*
MICHAEL R. FEAGLEY
JOHN E. MUENCH
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

LESLIE W. MORRIS II
Stoll, Keenon & Park, LLP
201 E. Main St.
Suite 1000
Lexington, KY 40507

**Counsel of Record*

AUGUST 29, 1996

(5)

No. 95-1263

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CATERPILLAR INC.,
Petitioner,

v.

JAMES DAVID LEWIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 22091
(703) 264-5300
Of Counsel

June 14, 1996

PATRICK W. LEE *
CHRISTOPHER J. MCGUIRE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

* *Counsel of Record for the Amicus Curiae*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.3 of the Rules of this Court, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary because the Respondent has refused consent.

Amicus, Product Liability Advisory Council, Inc. ("PLAC"), is a nonprofit corporation with 115 corporate members * from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to auto-

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* A list of members is provided in the attached Appendix. Petitioner Caterpillar Inc. is a member of PLAC. The *amicus curiae* brief, however, is not submitted on behalf of Caterpillar, which is represented separately before this Court.

mobiles to pharmaceutical products. PLAC's purpose is to file *amicus* briefs on behalf of its members on issues that affect the law of product liability. PLAC has submitted many *amicus* briefs in state and federal courts, including this Court.

The effective exercise of the right to remove a case from state to federal court and its impact on federal practice and procedure is of vital concern to American industry. Although it is not an issue that is strictly limited to the area of products liability, it is quite common in those cases. As a significant voice on issues in this area, PLAC seeks to submit this *amicus curiae* brief in order to identify for the Court the broader concerns and implications involved in making a determination on the issue before it.

Accordingly, *amicus* seeks leave to file this brief to assist the Court in its resolution of the case.

Respectfully submitted,

HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 22091
(703) 264-5300
Of Counsel

PATRICK W. LEE *
CHRISTOPHER J. MCGUIRE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

* *Counsel of Record for the Amicus Curiae*

June 14, 1996

QUESTION PRESENTED

Whether, when complete diversity exists at the time of final judgment, the judgment may be set aside and the case remanded from federal to state court on the ground that there was a procedural defect in the removal of the case to federal court.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS*

The interest of the amicus is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The right to remove a civil case from state to federal court is as old as the Republic itself. The first Congress provided this opportunity for defendants compelled to litigate beyond their home state. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (providing for removal when the amount in controversy exceeded $500 and the defendant was a citizen of a different state). The right of removal is a recognition that federal courts assure an

impartial forum in circumstances where original interests or identities might otherwise operate to prevent impartiality.

The value of that right is eroded, however, where valid federal judgments are subject to collateral attack on the basis of procedural requirements surrounding removal which lose their significance with the entry of judgment. At that stage, considerations of judicial efficiency simply outweigh the interests protected by strict adherence to the procedural rules governing how removal is accomplished. Protection of the value of the removal right and recognition of the interest of judicial efficiency suggest that the Court confirm a bright line rule that *no* violation of the removal statute is a proper ground for setting aside the judgment of a federal court where the court has jurisdiction at the time judgment is entered.

Such a bright line rule would not impermissibly expand federal jurisdiction. It would avoid giving significance to legal ritual that is without benefit to existing jurisprudence, the parties, or the judiciary.

At the very least, the Court should confirm such a bright line rule where the plaintiff has not sought interlocutory review of denial of a request for remand. The Court should deter the kind of gamesmanship that, for example, inheres in the decision of the respondent in this case to await a judgment in the district court before seeking appellate review of the propriety of the removal of the case to federal court. A litigant should not be permitted to await the outcome of his case and, losing, have the opportunity to try once again in another court on the basis of a procedural flaw that is without jurisdictional significance. The interest of judicial efficiency warrants a requirement of prompt request for interlocutory review of the remand decision.

Stating such a bright line principle, binding in this case, is entirely appropriate. The Sixth Circuit's decision here is contrary to the Court's holding in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951) and *Grubbs*

v. General Electric Credit Corp., 405 U.S. 699 (1972). The Sixth Circuit improperly ignored the complete diversity that existed at final judgment in this case. Reversing the Sixth Circuit would only uphold established precedent of this Court. Stating a bright line rule at this time, binding in this case, merely invokes established precedent in this case and directs the federal judiciary in future cases so as to end collateral attacks on federal court judgments based on insignificant removal issues. By confirming and clarifying the principles of *Finn* and *Grubbs*, this Court can preserve the important practical strength of a federal judgment and promote fundamental fairness by removing the incentive a plaintiff has to hide away for years, as plaintiff has done here, issues that should be resolved at the outset of litigation.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FINDING THAT THE DISTRICT COURT LACKED JURISDICTION OVER THIS CASE BECAUSE OF A FAILURE TO MEET REQUIREMENTS OF THE REMOVAL STATUTE AT THE TIME OF REMOVAL OF THE CASE TO FEDERAL COURT.

The Court has long protected the right to removal and cautioned in that context that " 'the Federal courts may, and should, take such actions as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals.' " *Wecker v. National Enameling and Stamping Co.*, 204 U.S. 176, 182-83 (1907) (quoting *Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906)).[1] The Court again emphasized the importance

[1] The Court has acted to safeguard this substantial right in numerous instances. For example, a plaintiff may not deprive a defendant of the right to proceed in federal court by amending a pleading to state damages that are below the jurisdictional amount. *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292 & n.23 (1938). In addition, the plaintiff may not attempt to

of preserving the right to remove in *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 101 (1898), in which the Court stated that the enforcement of an "incidental provision" should "yield to the principal enactment as to the right."

Several decisions of this Court make plain that in a removed case, whether removal is procedurally correct or not, the jurisdictional validity of a final judgment is determined on the basis of whether the district court possessed subject matter jurisdiction at the time the judgment issued. In *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), this Court noted that it had long upheld district court judgments even when there was no right of removal. *Id.* at 16 n.14 (citing *Baggs v. Martin*, 179 U.S. 206 (1900)). The Court in *Finn* explained that this determination was made because "the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment." *Id.* at 16.

The Court addressed this question again in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972). In *Grubbs*, the unanimous Court reversed the decision of the Fifth Circuit that the district court lacked jurisdiction because of imperfections in the removal of the case to federal court. The Court in *Grubbs* stated that "the requirement that jurisdiction exist at the time of judgment . . . is satisfied here." *Id.* at 705.[2]

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destroy diversity through improper joinder of nondiverse parties. *Wecker*, 204 U.S. at 182.

[2] This is not a rule limited to removed cases. Where a case is initially filed in federal court and lacks complete diversity at that point, a judgment entered at a later time when there is complete diversity is valid, the court having jurisdiction at the time of judgment. *See, e.g., Horn v. Lockhart*, 84 U.S. 570 (1873) (affirming the dismissal of a party prior to trial to preserve diversity jurisdiction); *Grant County Deposit Bank v. McCampbell*, 194 F.2d 469 (6th Cir. 1952). Moreover, the Court has gone even further to recognize the authority to dismiss parties during the *appellate* stage of litigation after judgment to preserve jurisdiction "particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges and other litigants waiting for judicial attention. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989).

That requirement is satisfied in this case as well. The only parties that participated in the trial of this case in the district court and were subject to its final judgment were respondent James Lewis, a citizen of Kentucky, and petitioner Caterpillar Inc., a Delaware corporation with its principal place of business in Illinois. It is black letter law that, at the time of entry of judgment in this case, there was the complete diversity necessary to invoke federal subject matter jurisdiction. The Sixth Circuit found that the jurisdictional clothes of the case were too ragged when it first appeared at the doorstep of the federal court; even if that were the case, it had undoubtedly changed into proper attire by the time the district court exercised its power to render a final judgment. As the previous decisions of this Court make manifest, it is the jurisdictional dress of the case at judgment that is determinative.[3]

The Court should confirm this rule with a bright line statement of the principle implicit in those decisions: *No* violation of the removal statute warrants setting aside a judgment of a federal court rendered at a time when the court had subject matter jurisdiction. Failure to comply with the removal statute does not have jurisdictional significance.

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[3] If there had been no diversity at the time of judgment, the Sixth Circuit would arguably have been correct in setting aside the judgment for lack of subject matter jurisdiction.

II. ONCE JUDGMENT HAS BEEN ENTERED IN A REMOVED CASE AND A PLAINTIFF HAS FAILED TO SEEK INTERLOCUTORY REVIEW OF A DENIAL OF A REMAND PRIOR TO THAT OUTCOME, ANY FAILURE TO MEET THE REQUIREMENTS OF THE REMOVAL STATUTE IS NOT A SUFFICIENT BASIS TO ATTACK SUCH JUDGMENT.

Congress has already invoked the practical principle that removal issues be resolved at the outset of a case. In 1988, it amended the removal provisions to provide that a motion to remand based on "any defect in removal procedure" must be made within thirty days after filing the notice of removal. 28 U.S.C. § 1447(c), *as amended by* Pub. L. No. 100-702, tit. X, § 1016(c)(1), 102 Stat. 4642, 4670 (1988). In elaborating on this Court's decisions in *Grubbs* and *Finn*, the Ninth Circuit and Fourth Circuit have similarly recognized this goal, a goal which has the dual benefits of promoting judicial economy and fairness. The decisions of the Ninth Circuit and the Fourth Circuit require the plaintiff to seek an interlocutory appeal of a denial of a remand. This forces an early determination of the issue so that it will be settled long before a case proceeds to final judgment in the district court.

Such a requirement works no injustice but merely prevents a plaintiff from electing to ignore the issue and later sandbagging a successful defendant on appeal.

The Ninth Circuit first considered this procedure in *Sheeran v. General Electric Co.*, 593 F.2d 93 (9th Cir.), *cert. denied*, 444 U.S. 868 (1979). Following removal, a motion to remand was denied. The plaintiff failed to seek an interlocutory appeal of the denial of remand. The court looked to *Grubbs* and concluded that, regardless of imperfections in the removal process, because jurisdiction existed at the time of judgment, the judgment should be upheld. *Id.* at 97-98. The court ruled that

"appellants are precluded at this late date from raising the removal issue." *Id.* at 98.

The Ninth Circuit elaborated on this analysis in *Gould v. Mutual Life Ins. C. of New York*, 790 F.2d 769 (9th Cir.), *cert. denied*, 479 U.S. 987 (1986). In applying *Finn* and *Grubbs*, the court reached the same result as in *Sheeran*, noting that in failing to pursue an interlocutory review the plaintiff should bear the risk that subject matter jurisdiction will exist at final judgment. *Id.* at 774. The court pointed out that the procedure puts the plaintiff to a choice as to what forum the plaintiff wishes to proceed in while at the same time promoting finality and judicial efficiency. *Id.*

The Fourth Circuit adopted this rule in *Able v. Upjohn Co., Inc.*, 829 F.2d 1330 (4th Cir. 1987), *cert. denied*, 485 U.S. 963 (1988). The court examined the holdings in *Finn, Grubbs, Sheeran* and *Gould* and found that the cases required the plaintiff to seek an interlocutory appeal of the denial of the remand motion: "Interests of finality and judicial economy also strongly suggest that the district court's judgment should not be disturbed where a party fails to avail himself of a remedy that might have earlier resolved the removal question. At this late stage in the proceedings, the judgment should stand." *Id.* at 1333. The court concluded that "[w]here a matter has proceeded to judgment on the merits and principles of federal jurisdiction and fairness to parties remain uncompromised, to disturb the judgment on the basis of a defect in the initial removal would be a waste of judicial resources." *Id.* at 1334. The Second Circuit has also indicated that it is persuaded by the reasoning of the Ninth and Fourth Circuits on this issue. *See Bleiler v. Cristwood Constr., Inc.*, 72 F.3d 13, 16 n.3 (2d Cir. 1995) (acknowledging *Gould* and *Able* as building on *Finn* and *Grubbs*).

Moreover, it is clear that this procedure does not run the risk of expanding federal jurisdiction. As the *Finn*

Court earlier noted, recognizing the validity of such judgments "did not endow [the federal court] with a jurisdiction it could not possess." *Finn*, 341 U.S. at 17; *see also Able*, 829 F.2d at 1333 (citing *Finn* on this point).

In this case, because Lewis did not seek an interlocutory appeal of the denial of the remand, he did not avail himself of the appropriate means to resolve any doubt concerning the removal to the federal court. Because there is no expansion of federal jurisdiction and fairness to the parties is not otherwise compromised, the judgment of the district court should stand.

CONCLUSION

The judgment of the court of appeals should be reversed with instruction to reinstate the judgment of the district court.

Respectfully submitted,

HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 22091
(703) 264-5300
Of Counsel

June 14, 1996

PATRICK W. LEE *
CHRISTOPHER J. MCGUIRE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

* *Counsel of Record for the Amicus Curiae*

APPENDIX

3M
ACRISON, Inc.
AlliedSignal, Inc.
Aluminum Co. of America
American Automobile Manufacturers Assn.
American Brands, Inc.
American Home Products Corp.
American Suzuki Motor Corp.
Andersen Corporation
Anheuser-Busch Companies
AT&T/Lucent Technologies Inc.
Atlantic Richfield Co.
Baxter International Inc.
Becton-Dickinson & Company
Beech Aircraft Corporation
BIC Corporation
Black & Decker Corp.
BMW of North America, Inc.
Boeing Company, The
Bridgestone/Firestone, Inc.
Briggs & Stratton
Bristol-Myers Squibb Co.
Brown-Forman Corporation
Budd Co., The
Burroughs Wellcome Co.
C.R. Bard, Inc.
Case Corporation
Caterpillar, Inc.
CBI Industries, Inc.
Chrysler Corporation
Ciba-Geigy Corp.
Clark Material Handling Company
Coca-Cola Co.
Coleman Co., Inc., The
Continental General Tire, Inc.
Corning Incorporated
Dana Corporation
Deere & Company
Dow Chemical Company, The
Eaton Corporation
Eli Lilly and Co.
Emerson Electric Co.
Estee Lauder Cos.
Exxon Corp.
Federal-Mogul Corp.
FMC Corporation
Ford Motor Co.
Freightliner Corporation
Gates Rubber Co., The
General Electric Co.
General Motors Corporation
Goodyear Tire & Rubber Company
Great Dane Trailers, Inc.
Guidant Corporation
Harrischfeger Industries
Hoechst Celanese Chemical Group, Inc.
Hoechst Marion Roussel, Inc.
Honda North America, Inc.
Hyundai Motor America
International Paper Company
Isuzu Motors America, Inc.
Jervis B. Webb Company
Johnson Controls, Inc.
Kaiser Aluminum & Chemical Corporation
Kawasaki Motors Corporation, USA
Kia Motors America, Inc.
Kraft Foods, Inc.

Lorillard Tobacco Company
Mack Trucks, Inc.
Mazda (North America), Inc.
Melroe Co.
Mercedes-Benz of N. America, Inc.
Michelin North America, Inc.
Miller Brewing Co.
Mitsubishi Motor Sales of America, Inc.
Monsanto Co.
Navistar International Transportation Corp.
New United Motors Manufacturing, Inc.
Nissan North America, Inc.
O.F. Mossberg & Sons, Inc.
Otis Elevator Co.
Owens-Corning Fiberglas Corporation
PACCAR Inc.
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Pharmacia and Upjohn, Inc.
Phillip Morris Companies, Inc.
Playtex Products, Inc.
Porsche Cars North America, Inc.
Procter & Gamble Co.
Raymond Corp., The
RJ Reynolds Tobacco Co.
Rockwell International Corporation
Rover Group, Ltd.
Schindler Elevator Corp.
Sears, Roebuck & Co.
Sherwood, a Division of Harsco Corp.
Simon Access-North America
Snap-on Incorporated
Sofamor Danek Group, Inc.
State Industries, Inc.
Sturm, Ruger and Co., Inc.
Subaru of America
Thomas Built Buses, Inc.
Toro Company, The
Toyota Motor Sales, USA, Inc.
TRW, Inc.
U.S. Tobacco
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Co.
Whirlpool Corp.
White Consolidated Industries, Inc.
Yamaha Motor Corp. USA